145-263

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1438~~. 889

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 17, 1890.

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1 At a stated term of the circuit court of the United States of America, within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, O., in said district, on the first Tuesday of April, being also the first day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth.

Present: The honorable George R. Sage, district judge.

Among the proceedings had were the following, to wit:

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 4336. In chancery.

Bill of complaint.

Be it remembered that heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and ninety, came the complainant, by its solicitors, A. G. Safford and John W. Herron, and filed in the clerk's office of said court their certain bill of complaint herein, against the defendant, the Baltimore and Ohio Railroad Company.

2 Said bill of complaint is clothed in the words and figures following, to wit:

3 *Bill of complaint.*

In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity.

To the circuit court of the United States, sitting in equity, within and for the southern district of Ohio, western division.

Your petitioner, the Interstate Commerce Commission, which was created and established, and now exists, under and by virtue of an act of the Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, as amended by an act approved March 2, 1889, humbly complaining, sheweth unto your honors that the Baltimore and Ohio Railroad Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Maryland, having its principal office at the city of Baltimore, in Maryland, aforesaid, and was at the time of the committing of the grievances hereinafter specifically mentioned, and still is, a common carrier, engaged in the transportation of persons and property by its railroad, extending through several of the States of the United States, under a common control, management, and arrangement for a continuous carriage, and particularly was it then engaged in such business between cities and towns within the State of Ohio and other cities and towns without that State, and within the States of West

Virginia, Pennsylvania, Maryland, and New York, and as such
4 carrier was, during all the time aforesaid, and still is, subject to all the various provisions of the said act, entitled "An act to regulate commerce," and the said amendment thereto.

That the said Baltimore and Ohio Railroad Company was heretofore, to wit, on the tenth day of July, 1889, duly impleaded, in a controversy not requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, before the said Interstate Commerce Commission, upon the petition of the Pittsburg, Cincinnati, and St. Louis Railway Company, a corporation duly created and organized under the laws of the States of Pennsylvania, West Virginia, and Ohio, for the alleged violation on the part of the said Baltimore and Ohio Railroad Company of the provisions of the said act, entitled "An act to regulate commerce," and the amendment thereto, as aforesaid, as at large and more fully appears in and by the said petition, on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit "A."

That thereafterwards, to wit, on the thirty-first day of July, 1889, the said Baltimore and Ohio Railroad Company filed its answer to the above mentioned petition of the said Pittsburg, Cincinnati, and St. Louis Railway Company, as at large and more fully appears in and by said answer, on file in the office of said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit "B."

5 That thereafterwards, the said parties being at issue upon the pleadings aforesaid, the said cause duly came on for investigation and hearing before the said Interstate Commerce Commission, duly and legally assembled for that purpose at the city of Washington, in the District of Columbia, on the fifteenth day of November, 1889, when the said complainant, the said Pittsburg, Cincinnati, and St. Louis Railway Company, as well as the said respondent, the Baltimore and Ohio Railroad Company, duly appeared by their respective officers and attorneys, and thereupon the said cause proceeded to hearing and determination.

That at the said hearing it was made to appear to the satisfaction of said commission that the said Baltimore and Ohio Railroad Company had violated the provision of said act, entitled "An act to regulate commerce," and the said amendment thereto, as was stated and charged to have been violated by it in the said petition hereinbefore referred to as a part hereof, and thereupon the said commission duly and legally determined the matters and things in controversy and at issue between the said parties, and made a report in writing with respect thereto, which included the findings of fact upon which the conclusions of said commissions were based as at large and more fully appears in and by the report of the determination of the said commission in regard thereto on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition,
6 the same being marked Exhibit "C." That thereafterwards and forthwith upon the determination of the said cause, as aforesaid, the said commission duly formulated an order and notice in relation to the matters and things stated and charged in the said petition, based upon the findings and determination of the said commission with respect thereto agreeably to the requirements of the statute in such case made and provided, which said order now remains in full force and effect, never having

been vacated, set aside, altered, modified, or changed in any respect whatever, and is now on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit "D."

That thereafterwards, to wit, on the fourth day of March, 1890, the said commission, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report in respect thereto as aforesaid, together with the order and notice aforesaid, to be delivered to the said Baltimore and Ohio Railroad Company, and thereupon the petitioner shows that it has not been made to appear to the said commission that the said Baltimore and Ohio Railroad Company has ceased and desisted from the violations of law set forth in the said report and order of the said commission, but, on the contrary thereof, the said Baltimore and Ohio Railroad Company, unmindful of its duty in that regard and of the decision and determination of the said commission, as stated in its report as aforesaid, hath,

7 through its officers, servants, and attorneys, wholly disregarded and set at naught the authority and order of the said commission in that regard, and hath wilfully and knowingly violated and disobeyed the said order, and hath from the time of the issuance and service of the said order and notice as hereinabove set forth, hitherto wholly neglected and refused, and still does neglect and refuse to furnish to the said commission, and to print, post, and file schedules, showing the rates, fares, and charges established by it for round-trip passenger excursion tickets between points on its lines, or between points on its lines and points on the lines of other common carriers with whom it joins, or has joined, in establishing rates, fares, and charges therefor, as required by law, and as in and by said order it was solemnly enjoined and required to do, and the said Baltimore and Ohio Railroad Company has not wholly ceased and desisted from charging rates for the transportation over its lines of a number of persons traveling together in one party, which are less for each person than rates contemporaneously charged by the said Baltimore and Ohio Railroad Company, under schedules lawfully in effect for the transportation of single passengers between the same points, as it was solemnly enjoined and required to cease and desist from doing in and by said order, but, on the contrary, the said Baltimore and Ohio Railroad Company hath, on divers occasions, and at divers times, since the issuance and service of said order and notice, charged rates for the transportation over its lines of a number of persons traveling together in one party, which were less for each person than rates

8 *rates* contemporaneously charged by the said Baltimore and Ohio Railroad Company, under schedules lawfully in effect between the same points for the transportation of persons, and among other acts and violation and disobedience thereto, the said Baltimore and Ohio Railroad Company did, at Columbus, in the State of Ohio, within the jurisdiction of this honorable court heretofore, to wit, on the 29th day of March, 1890, charge to and receive from a party composed of several persons, to wit, twelve persons, comprising "The Martin-Hayden Company" (as it was called), only the sum of, to wit, eleven dollars and ninety-five cents each for the transportation of said persons from the said city of Columbus within the State of Ohio, to the city of Philadelphia, in the State of Pennsylvania, a rate which was then less, to wit, the sum of two dollars and

ten cents less for each person than rates contemporaneously charged by the said Baltimore and Ohio Railroad Company for the transportation of single passengers under schedules then lawfully in effect between the said city of Columbus and the said city of Philadelphia; and also that in that the said Baltimore and Ohio Railroad Company did, in conjunction with the Columbus, Hocking and Toledo Railroad Company, and in pursuance of a secret understanding with that company, and in violation and disobedience to said order heretofore, to wit, on the 16th day of March, 1890, charge to and receive from a party of several persons, to wit, of twelve persons, comprising "The Shook and Collier Blue and Gray Company" (as it was
9 called), only the sum of four dollars and ninety cents each for the transportation of said persons from the city of Toledo, within the State of Ohio, by way of Columbus and the Baltimore and Ohio Railroad Company's Railroad from that city to the city of Pittsburg, in the State of Pennsylvania, a rate which was then less, to wit, the sum of two dollars and twenty cents less for each person than rates contemporaneously charged by said Baltimore and Ohio Railroad Company and the said Columbus, Hocking Valley and Toledo Railroad Co. jointly for the transportation of single passengers under schedules then lawfully in effect between the said city of Toledo and the said city of Pittsburg; and also in that the said Baltimore and Ohio Railroad Company did, at Columbus, in the said State of Ohio heretofore, to wit, on the first day of April, 1890, in violation of said order, charge to and receive from a certain other party composed of several other persons, to wit, twenty persons, comprising "The Julia Marlowe Company" (as it is called), a sum of money for the transportation of said last-named persons from the said city of Columbus to the city of New York, in the State of New York, which was then less, to wit, one dollar and sixty cents less for each person, than rates contemporaneously charged by the said Baltimore and Ohio Railroad Company under schedules lawfully in effect for the transportation of single passengers between those points.

And the petitioner is informed and believes that there have been other violations of said order by the said Baltimore and Ohio Railroad
10 Company, the particulars of which the petitioner craves leave to insert herein, together with apt words charging the said Baltimore and Ohio Railroad Company therewith, when the petitioner shall have discovered the full facts and details in regard thereto, and by way of specification the petitioner attaches hereto a schedule, marked "Exhibit E," as a part hereof, showing some of said violations of said order, together with the dates, description of the persons improperly transported, as well as the points of departure and destination.

Wherefore the petitioner prays:

1. That a subpœna, or other suitable process, may issue according to the course of equity, requiring the said Baltimore and Ohio Railroad Company to appear at such time and place as this honorable court may determine, then and there to make full, complete and perfect answer to all the matters and things hereinabove stated and charged as fully and particularly as if the said company were distinctly and specially interrogated in regard thereto, said answer to be verified by oath.

2. That upon the filing of this petition an order may be passed by this honorable court directing the method of service of notice of the pendency of this proceeding.

3. That such order or orders may be passed, pending the cause, as will secure a speedy hearing and determination of the matters and things stated and charged in the foregoing petition.

11 4. That such order, or orders, may be passed, pending the cause, as may be necessary for the prosecution of all such inquiries as the court may think needful to enable it to form a just judgment of the matters and things stated and charged in the foregoing petition.

5. That an order may be entered, pending the cause, granting to the petitioner a writ of injunction or other proper process, mandatory or otherwise, to restrain the said Baltimore and Ohio Railroad Company, its officers, servants, and attorneys from further continuing in its violation of and disobedience to, the said order of the said Commission, and that upon final hearing such injunction may be made perpetual.

6. That a decree may be entered, if it shall seem meet to this honorable court, requiring the said Baltimore and Ohio Railroad Company to pay such sum of money, not exceeding the sum of five hundred dollars for every day, after a day to be named in said decree, that said Baltimore and Ohio Railroad Company shall fail to obey the said injunction or other proper process.

7. For such other and further relief in the premises as to the court may seem meet and the equities of the petitioner's cause may require.

THE INTERSTATE COMMERCE COMMISSION,
[SEAL.] By EDW. A. MOSELEY,
The Secretary thereof, thereunto duly authorized.

A. G. SAFFORD,
Solicitor for the Petitioner.

12 *Petition.*

EXHIBIT A.—Pittsburg, Cincinnati, and St. Louis Railway Company *vs.* Baltimore and Ohio Railroad Company.

To the honorable, the Interstate Commerce Commission:

Your petitioner, the Pittsburg, Cincinnati and St. Louis Railway Company, respectfully represents that it is a corporation duly created and organized under the laws of Pennsylvania, West Virginia, and Ohio, and is a common carrier operating a system of railroads extending from the city of Pittsburg, Pa., to various towns and cities in the States above named.

That the Baltimore and Ohio Railroad Company is likewise a corporation duly created under the laws of the State of Maryland, and is a common carrier operating a system of railroads, a part of which extends from said city of Pittsburg to many of the important towns and cities in the above-named States which are reached by your petitioner's lines of road, and is a competitor of your petitioner in respect to business between said points.

That the Baltimore and Ohio Railroad Company upon its lines of road on which business competitive with that of your petitioner is transacted, has put into effect and now has in operation so-called "party rates," whereby parties of ten or more persons traveling together on one

13 ticket will be transported over said lines of road between stations located thereon, at two cents per mile per capita, which is less than

the regular rate for a single person; said rate for a single person being about three cents per mile.

Your petitioner further says that said Baltimore and Ohio Railroad Company is in the habit of selling round-trip excursion tickets good between points on its lines of railway at less than rates charged for ordinary tickets, without publicly posting in its ticket offices or elsewhere the rates at which said excursion tickets are sold.

That in the judgment of your petitioner this action on the part of the Baltimore and Ohio Railroad Company is in violation of the interstate-commerce act, and for this reason your petitioner has declined and continues to decline to place in effect upon its lines of road the so-called "party rates," and to sell excursion tickets without posting in its offices the rates for such tickets.

That by reason of said "party rates" and excursion rates being allowed on the Baltimore and Ohio Railroad Company's road in the manner stated, whilst they are not allowed on your petitioner's lines of road, traffic is diverted from your petitioner's lines to those of the Baltimore and Ohio Company, and your petitioner is greatly damaged by loss of revenue thereby.

Wherefore your petitioner prays that an order may be granted requiring the Baltimore and Ohio Railroad Company to withdraw from its lines of road upon which business competitive with that of your petitioner is transacted, the so-called "party rates," and to decline to give such rates
14 in the future upon said lines of road; and also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless the rates for such tickets are posted in its offices as required by the interstate-commerce law in reference to the publication of rates for the transportation of passengers.

PITTSBURG, CINCINNATI & ST. LOUIS RAILWAY COMPANY.
By J. T. BROOKS,
General Counsel.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

J. T. Brooks, being duly sworn, says that he is general counsel of Pittsburg, Cincinnati and St. Louis Railway Company, and as such has charge and direction of the law business of said company, and that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

J. T. BROOKS.

Sworn to by the said J. T. Brooks and by him subscribed in my presence this 5th day of July, in the year eighteen hundred and eighty-nine.

[SEAL.] WM. K. GRAY,
Notary Public.

15 (Endorsements:) No. 215. Pittsburg, Cincinnati and St. Louis Railway Company, complainant, *vs.* Baltimore and Ohio Railroad Company, defendant. Before the Interstate Commerce Commission. Petition filed July 10, 1889. Address: Pittsburg, Cincinnati & St. Louis Railway Company, and J. T. Brooks, attorney, Pittsburg, Pa.

16 *Answer.*

EX'IBIT B.

PITTSBURG, CINCINNATI AND ST. LOUIS RAILway Company
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

Before the Interstate Commerce Commission.

The above named defendant, for answer to the complaint in this proceeding, respectfully states:

1. That it admits that the complainant is a corporation and common carrier as stated in the petition, and that the defendant is likewise a corporation and common carrier as therein stated.

2. That this defendant admits that at one time prior to the filing of the complaint herein it had in effect so-called "party rates," whereby parties of ten or more persons traveling together on one ticket were transported at the rate of two cents per mile per capita. This defendant, however, states that prior to the filing of this complaint, to wit, on the third day of July, 1889, it had withdrawn said rates; it further states that its reason for withdrawing said rates was not that it believed that they were illegal, but because it was claimed by other competitive railroad companies, members of what is known as the "Trunk Line Passenger Asso-
17 ciation," that the said rates were put into effect in violation of the agreement between the companies belonging to the said association.

This defendant believes and therefore states that the said rates as made by it were in no way a violation of the act to regulate commerce or any other law; that they were an accom'odation to the public, necessary to the business of theatrical and other amusement companies; and defendant states that when the question of the legality of such rates is properly raised for decision by this honorable Commission it is prepared to defend the legality of the same.

3. This defendant admits that it has heretofore and does still sell, on or between special dates, round-trip excursion tickets at less rates than those charged for ordinary tickets without posting notice of the same in its ticket offices except by way of advertisement.

This defendant states that the excursion tickets so sold as such excursion tickets as are mentioned in the 12nd section of the act to regulate commerce as amended March 2, 1889; that the said act does not require or contemplate posting the rates at which such excursion tickets are sold; that it would be practically useless if not impossible to post them.

The object of making such excursion rates is, of course, to sell as many tickets as possible; it is therefore to the interest of this defendant when it makes such rates to give them the greatest publicity. This defendant does publish such rates through the usual means, as newspaper ad-
18 vertisement, hand-bills, etc., but it does not undertake to fill up its ticket offices with useless notices.

This defendant further states on information and belief that no railroad company in the country, including the complainant, undertakes to post such notices.

And further answering this defendant denies that the complainant is injured by reason of any concealment or attempted concealment of the rates

so made by this defendant; but on the other hand it avers that the complainant has notice in advance through the Central Traffic Association, of which both complainant and defendant are members, of every such rate on business for which this defendant competes with the complainant.

4. Further answering this defendant says that the present complainant is not entitled to institute the present proceeding before this honorable Commission; that it is not such a complainant as is authorized by the act to regulate commerce to institute such a proceeding; wherefore the defendant prays that the complaint in this proceeding be dismissed.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By C. K. LORD,
Third Vice-President.

STATE OF MARYLAND,
City of Baltimore, ss:

Charles K. Lord, being duly sworn, says that he is third vice-president of the Baltimore and Ohio Railroad Company, the defendant
19 in this proceeding; that the foregoing answer is true as he verily believes.

C. K. LORD.

Subscribed and sworn to before me this thirtieth day of July, 1889.
ROBERT A. THURSBY, *J. P.*,
Justice of the Peace of the State of Maryland in and for the City of Baltimore.

Val.] (Copy.)

PITTSBURG, CINCINNATI AND ST. LOUIS RAILWAY COMPANY *vs.* BALTIMORE AND OHIO RAILROAD COMPANY. } Before the Interstate Commerce Commission.

Motion to dismiss.

The Baltimore and Ohio Railroad Company, defendant in this proceeding, moves this honorable Commission to dismiss the complaint filed herein on the ground that it is insufficient in that the complainant, the Pittsburg, Cincinnati and St. Louis Railway Company, complains only of injury to it as a competing carrier by reason of the acts of the defendant stated in the complaint; the said complaint does not allege facts sufficient to bring the complainant within any of the classes of persons, firms, corporations, or associations authorized to institute such a proceed-
20 ing before this Commission under the provisions of the act of Congress passed February 4, 1887, and amended March 2, 1889, entitled "An act to regulate commerce."

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By JOHN K. COWEN,
H. L. BOND, Jr.,
Counsel.

(Endorsements:) No. 215. Before the Interstate Commerce Commission. Pittsburg, Cincinnati & St. Louis Railway Company vs. Baltimore and Ohio Railroad Company. Answer. Filed July 31, 1889.

21 *Report and opinion of the Commission.*

EX'IBIT C.

Before the Interstate Commerce Commission.

The Pittsburg, Cincinnati, and St. Louis Railway Company *vs.* The Baltimore and Ohio Railroad Company.

Complaint filed July 10, 1889.—Answer filed July 31, 1889.—Heard November 15, 1889.—Briefs filed January 11–13, 1890.—Decided February 21, 1890.

Passenger excursion rates are required to be published according to the provisions of section 6 of the act to regulate commerce.

Party-rate tickets are not commutation tickets, and when party rates are lower than contemporaneous rates for single passengers they constitute discrimination and are illegal.

J. T. Brooks for complainant; John R. Cowan and Hugh L. Bond, jr., for defendant; A. J. Dittenhoefer, Delos McCurdy, Augustus Vanderpoel, for theatrical managers.

Report and opinion of the Commission.

VEAZEY, *Commissioner:*

22 The substance of the petition is that the parties hereto are common carriers, subject to the act to regulate commerce, and are competitors in business; that the respondent has adopted and has in operation "party rates," so called, whereby parties of ten or more persons traveling together on one ticket are transported over the respondent's lines of roads between stations located thereon at two cents per mile per capita, which is less than the regular rate for a single person, said rate being about three cents per mile; that said company also sells round-trip excursion tickets, good between points on its lines, at less than the rate for ordinary tickets, without publickly posting in its ticket offices or elsewhere the rates at which said tickets are sold, and charging that this practice of the respondent is in violation of the act to regulate commerce, and for this reason is not participated in by the complainant and thereby traffic is diverted from petitioner's lines to those of the respondent to the damage and loss of the petitioner; and the petitioner prays that the respondent may be ordered to withdraw from its lines of road, upon which business competitive with that of the petitioner is transacted, the so-called "party rates," and to discontinue giving such rates in the future, and also requiring respondent to discontinue the practice of selling excursion tickets at less than the regular rates unless the rates on such tickets are posted in its offices as required by the act to regulate commerce.

The respondent answered, admitting the facts substantially as charged, but denying that they were in violation of the act to regulate commerce or any other law, and claiming that the excursion tickets are such

23 as are mentioned in the 22nd section of that, and that the act does not require or contemplate the posting of rates at which such excursion tickets are sold, and that it would be practically useless, if not impossible, to post them.

It was urged on behalf of the petitioner, the same as alleged in the complaint, that the so-called party rates are not warranted by law, and are demoralizing in effect, and necessarily work a discrimination against the single passenger who purchases his ticket at the regular office and in favor of the customer of the ticket broker. It was also insisted that under the act to regulate commerce it is required that excursion rates shall be posted in the same manner as in the case of the ordinary rate.

Counsel appeared both in behalf of the respondent railroad company and of the managers of theatrical companies, who are claimed to be especially interested in maintaining the socalled "party rates."

Counsel for petitioner offered no evidence. Some evidence was taken in behalf of the respondent tending to show that the practice here complained of as to party-rate tickets was in effect for several years prior to the enactment of the act to regulate commerce, and that such practice obtained in the different countries of Europe, and that theatrical companies are especially favored in that regard there; that unless the law allows the issuance of such tickets theatrical companies can not afford to travel, and the present practice of first-class companies going from the great cities through the country to the smaller places would have to cease, and thereby the country at large, outside of the great centers, would be deprived of large, first-class theatrical entertainment.

24 No question was made on the trial but that the parties to this case were common carriers, subject to the act to regulate commerce, or that the respondent issued the so-called "party-rate" tickets to all persons alike who desired to buy a ticket for ten or more persons, but the respondent company did not sell such a ticket to any one for a less number than ten, and the fact is so found. Neither was it disputed that the respondent had issued excursion tickets without posting notices of the excursion rate in its several stations as required by law in case of the regular rate.

It is found that the practice of selling party rates existed at the time that the act to regulate commerce was enacted, and had so existed for several years previously; that under authority of law the practice obtains in Europe to a greater or less extent of transporting theatrical companies at reduced rates below the regular rates of carriage; that although these so-called party-rate tickets are offered to all persons alike they are not used to great extent by others than traveling theatrical companies. The saving to the theatrical companies under the party-rate system is very great, owing to the great number and large size of such traveling companies. It was claimed that that saving was so great that there could only be a profit in the business of such companies by having the privilege, and this commission is not prepared to say, from the evidence in the case, that it is not so. Neither is it prepared to say to what extent it would interfere with or stop the business of traveling theatrical companies to require the payment of full regular rates for persons and scenery.

25 Counsel for the respondent railroad company claimed that under the party-rate ticket method there was no discrimination, neither between different theatrical managers nor between theatrical business and other kinds of business, because the offer of such tickets was open to everybody alike.

Therefore he insisted there was no violation of the provisions of the

second and third sections of the act to regulate commerce, which are based on the idea and principle of equality of rate and service to all persons alike from common carriers who are public servants. By the party-rate system the carrier says to all persons in substance: If you want one ticket for the transportation of ten or more persons on the same train, to the same destination, you can have it at a specified reduced rate below the regular rate. Is this an unjust discrimination or the giving of undue or unreasonable preference or advantage to the purchaser of such a ticket (within the meaning of the provisions of the second and third sections of the act) as against the persons, from one to nine, inclusive, who have to pay the higher regular rate for precisely the same transportation and service? The answer may be aided somewhat by another question: Why may a party of ten or more persons have individually a lower rate than a party of nine or less, from a common carrier which is bound to treat all patrons equally who have the same amount and quality of service? The design of the act to regulate commerce was to put each individual, in the matter of transportation, on exact equality, with only such exceptions as the act itself specified. It was not a new idea in law, for it had
26 always been recognized as a sound legal proposition, though violated in practice, that a common carrier must treat all persons alike under similar circumstances and conditions. It is difficult to see how this individual equality is preserved when in a car-load, say of nineteen persons, all starting from the same point, and having the same destination, ten of them pay two cents per mile each, and the other nine three cents.

If tickets can be sold at reduced rates for parties of ten, there is no limit either in number or in rate for which they may be sold; the law may thus be rendered a meaningless enactment, and its purposes wholly defeated at the discretion of carriers. It would seem that, standing upon the general provisions and theory of the act, this form of ticket can not be sustained.

But the act provides, section 22, "that nothing in act shall prevent * * * * the issuance of mileage, excursion, or commutation passenger tickets;" and it is here claimed that the party rate is but a form of commutation. If that is so, then it must be sustained, notwithstanding it is in itself a violation of and opens the door to abuses of the fundamental idea of the enactment.

The question, therefore, is, how is the word "commutation," as used in said act, to be construed?

The witnesses in this case threw but little light on the subject as to the definition of the term "commutation," or whether a party-rate ticket properly came under that class.

The official correspondence and records in the hands of the commission do, however, easily settle the question that a one-way party ticket
27 was not at the time the act was passed, and has not since been, regarded or treated in official railroad circles as embraced under the head of commutation. We have found nothing to the contrary prior to the act, and such is the great preponderance of the evidence, although not universal, since the act took effect.

A one-way party ticket entitles the number of persons specified thereon to transportation of the quality indicated by the ticket, without stop-over, from and to the stations named on the ticket, within the limit specified.

It is used for irregular travel between points varying with the applications of parties traveling one way. A commutation ticket entitles the holder (one person) to one first-class passage, without stop-over, for each number indicated on, or each coupon attached to, the ticket, between the stations named, in either direction, and is available to any one under the conditions and within the limits specified in the contract. It is a kind of ticket largely used by suburban residents traveling between their homes and the larger cities, such as business men, school children, employés, etc. It has various forms but is uniform in substance. It is a ticket generally on sale regularly by railroads, while party rates are commonly made to suit the particular conditions governing each party. We think the best expert railroad authority is to the above effect, and also that party-rate tickets are an entirely distinct class from commutation tickets, and are for a different class of travel. It is not claimed that this ticket comes under either of the other classes excepted in the act, viz, mileage and excursion.

28 The argument that the party rate ought to be sustained, as otherwise traveling theatrical companies will have to retire from the business, which the evidence tended strongly to show might be the case, and all places except comparatively few large cities would be deprived of this kind of first-class entertainments, is one for the consideration of Congress under a proposition to amend the act. But as the ticket can not be sustained on the ground of equality of service, and rate is not embraced within the excepted classes, this Commission has no power to furnish relief to the theatrical companies.

It is urged that party rates were in force at the time the act to regulate commerce was passed. We have no doubt of this from the evidence and official records in this office; but it affords no argument for the contention of the respondent railroad or the theatrical managers, but the reverse, because as Congress did make exceptions to the operation of the act, the not including this form of ticket in the exceptions indicates a purpose to exclude it, under the common-law rule that the express mention of one thing implies the exclusion of other things not mentioned.

One of the reasons that may have influenced Congress in not providing for such tickets is the facility with which they might be used for speculative purposes. If generally issued by railroads they would be a most convenient and inviting method for evading the law in the hands of ticket brokers. The Commission has heretofore had occasion to consider

29 tickets of this character and then condemned their use. See memorandum, p. 649, 2 I. C. C. Rep. The Commission there said: "The practice is vicious in conception and demoralizing in effects; it necessarily works a discrimination against the single passenger who purchases his ticket at the regular ticket office and in favor of the customer of the broker." It is plain that if the party-rate ticket should be added to the exceptions to the operation of the act specified in section 22, for the benefit of theatrical companies, it ought to be under regulations that would prevent it from becoming a source of evasion of the law by ticket speculators.

Another point urged in the defense is that when a discrimination is not between persons who are competitors in the same line of business it is not in violation of the act, and that this applies to passengers as well as to freight transportation. The Commission considered and answered this

claim in the holding in Smith vs. The Northern Pacific Railroad Company (1 I. C. C. Rep., p. 208), to the effect that the rule under which passenger transportation should be conducted requires absolute equality of payment from all persons enjoying the same accommodations.

The other complaint in the petition is that the respondent road does not print and post its excursion rates as required for regular rates. The charge is admitted, but it is claimed to be unnecessary under the provisions of section 22.

Section 6 of the act to regulate commerce, after providing for the printing and posting of schedules of rates, fares, and charges, &c., says:

"And when any such common carrier shall have established and
30 published its rates, fares, and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

We think it is too plain to require discussion that under this provision excursion rates as well as others must be printed and posted, as in the case of other rates. The only ground upon which the respondent can stand is that the provision of section 22, to the effect that nothing in the act shall prevent the issuance of excursion tickets, takes such tickets from under the operation of the provision last above quoted. But the view of this commission has always been that in the issuance of mileage, excursion, and commutation passenger tickets the other provisions of the act do apply so far as preserving equality as to the method of issuing them; as illustrated in Larrison vs. Chicago and Grand Trunk Railway Company (7 I. C. C. Rep., p. 147), where it was held that when a railroad company sells mileage tickets it must sell them impartially to all the public who apply for them; and that their sale to a particular class of persons at lower rates than are charged to others is unjust discrimination. Inasmuch as excursion rates must be general and open to all alike, there can be no embarrassment in requiring them to be posted like other rates.

The respondent railroad company must therefore be notified to
31 immediately cease and desist from selling said party-rate tickets, and ordered to print and post excursion rates according to the provision of section 6 of the act to regulate commerce.

Order.

EXHIBIT D.

At a general session of the Interstate Commerce Commission, held at its office in Washington on the 21st day of February, A. D. 1890.

Present: Hon. William R. Morrison, acting chairman; Hon. Augustus Schoonmaker, Hon. Walter L. Bragg, Hon. Wheelock C. Veazy, Commissioners.

The Pittsburg, Cincinnati & St. Louis Railway Company vs. The Baltimore & Ohio Railroad Company.

This case, being at issue upon complaint and answer on file, and having been duly assigned for hearing on the 15th day of November, 1889, and

a hearing having been had upon the pleadings, proofs, and arguments of counsel, and the report and opinion of the commission having been made and filed, whereby, among other things, it is found and decided that schedules of rates and fares charged for round-trip passenger excursion tickets must be printed, kept open to public inspection, and posted in accordance with the provisions of section 6 of the act to regulate commerce;

32 And also further found that so-called party-rate tickets sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of section 22 of the act to regulate commerce, and that when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points they constitute unjust discrimination, and are therefore illegal.

It is ordered and adjudged that the defendant, the Baltimore and Ohio Railroad Company, be, and it is hereby, required to print, post, and file schedules showing the rates, fares, and charges now or hereafter established by it for round-trip passenger excursion tickets between points on its lines and points on the lines of other common carriers with whom it joins, or hereafter may join, in establishing rates, fares, and charges therefor, in conformity with the provisions of section 6 of the act to regulate commerce.

It is further ordered and adjudged that the defendant, the Baltimore and Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points.

And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the commission herein, in conformity with the pro-

33 visions of the fifteenth section of the act to regulate commerce.

Schedule.

EXHIBIT E.—Schedule showing date, description, departure, and destination of parties transported by the Baltimore and Ohio Railroad Company in violation of the order of the Interstate Commerce Commission dated February 21st, 1890.

Date, about—	Name of troupe.	Carried: From—	To—
March 8th..	Bennett & Moulton	Cincinnati, O	Pittsburg, Pa.
March 15th..	Exiles	Cincinnati, O	Pittsburg, Pa.
March 15th..	My Partner	Cincinnati, O	Baltimore, Md.
April 6th	True Irish Hearts	Cincinnati, O	Pittsburg, Pa.
April 11th ...	Kellar (magician)	Cincinnati, O	Philadelphia, Pa.
April 19th ...	Lost in New York	Cincinnati, O	Pittsburg, Pa.
March 8th ...	Paymaster	Chicago, Ills	Columbus, O.
April 5th	Capt. Swift	Chicago, Ill	Washington, D. C.
April 12th ...	My Jack	Chicago, Ill	New York, N. Y.
April 19th ...	Chicago B. B. Club	Chicago, Ills	Pittsburg, Pa.
March 8th ...	Margaret Mather	Columbus, O	Chicago, Ills.
March 22nd..	Under the Lash	Columbus, O	Pittsburg, Pa.
March 22nd..	Richmond Comedy Co	Columbus, O	Pittsburg, Pa.
April 12th	Murray and Murphy	Columbus, O	Philadelphia, Pa.
April 12th ..	Partner in Crime	Columbus, O	Pittsburg, Pa.

34 And afterwards, to-wit, on the 1st day of May, in the year of our Lord eighteen hundred and ninety, the following entry was made on the journal of the court aforesaid, clothed in the words and figures as follows:

(Entry, z. 35.)

In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD Company. } In equity.

And now, upon the filing of the foregoing petition, it is ordered, that service thereof be had by delivering a copy thereof, authenticated by the secretary of the said Interstate Commerce Commission, under the seal of said Commission, to the president, or one of the vice-presidents, or the secretary of the defendant corporation, at its principle office in the city of Baltimore, State of Maryland, and also to the principle agent of the defendant corporation in the city of Cincinnati, State of Ohio, on or before the 7th day of May, 1890.

Done in court this 1st day of May, 1890.

And afterwards, to wit, on the 1st day of May, A. D. 1890, there was issued out of the clerk's office of the court aforesaid the following certified copy of "order as to service of petition," clothed in the words and figures as follows:

35 In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD Company. } No. 4336. In equity.

Certified copy of order of service of petition.

And now, upon the filing of the foregoing petition, it is ordered, that service thereof be had by delivering a copy thereof, authenticated by the secretary of the Interstate Commerce Commission, under the seal of said Commission, to the president, or one of the vice-presidents, or the secretary of the defendant corporation, at its principle office in the city of Baltimore, State of Maryland, and also to the principle agent of the defendant corporation in the city of Cincinnati, State of Ohio, on or before the 7th day of May, 1890.

Done in court this 1st day of May, 1890.

Copied from the journal.

[SEAL.] B. R. COWEN, *Clerk.*

Attest: By ——— ———, *Deputy.*

And afterwards, to wit, on the 1st day of May, A. D. 1890, the following "motion for order as to answer" was filed in the clerk's office of the court above named, clothed in the words and figures as follows:

36 In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity.

Motion for order as to answer, etc.

And now, upon the filing of the foregoing petition, comes the petitioner therein, The Interstate Commerce Commission, by the district attorney of the United States within and for the southern district of Ohio, and moves this honorable court for an order upon the defendant as follows:

1. That it may be required to file its verified answer to said petition, as prayed for in said petition, by a day certain.

2. That the court, as to it shall seem meet, shall determine as to the course of procedure which shall be pursued by the parties to said cause, as to the taking of testimony and such other proceedings as will enable the court speedily to form a just judgement in regard to the matters set forth in the said petition.

Dated at Cincinnati, in the southern district of Ohio, this 1st day of May, 1890.

JOHN W. HERRON,
District Attorney.

And afterwards, to wit, on the 1st day of May, A. D. 1890, there was issued out of the clerk's office of the court above named the following certified copy of motion for order as to answer, etc., clothed in the words and figures as follows:

37 In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity.

Certified copy of motion issued.

And now, upon the filing of the foregoing petition, comes the petitioner therein, The Interstate Commerce Commission, by the district attorney of the United States within and for the southern district of Ohio, and moves this honorable court for an order upon the defendant as follows:

1. That it may be required to file its verified answer to said petition, as prayed for in said petition, by a day certain.

2. That the court, as to it shall seem meet, shall determine as to th course of procedure which shall be pursued by the parties to said cause, as to the taking of testimony and such other proceedings as will enable the court speedily to form a just judgement in regard to the matters set forth in the said petition.

Dated at Cincinnati, in the southern district of Ohio, this 1st day of May, 1890.

(Signed) JOHN W. HERRON,
District Attorney.

THE UNITED STATES OF AMERICA, *Southern District of Ohio, ss:*

A true and correct copy of the original motion on file in the clerk's office of said court in the above-entitled cause.

Attest:

[SEAL.]

B. R. COWEN, *Clerk,*
By ——— ———,
Deputy.

38 And afterwards, to wit, on the 1st day of May, A. D. 1890, there was an entry made on the journal of the above-named court, in the above-named cause, clothed in the words and figures as follows:

(Entry Z. 35.)

In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity.

And, now, upon the filing of the motion in the above-entitled cause, by the district attorney of the United States for the southern district of Ohio, praying for an order as to the answer of the defendant, and as to the method of procedure in said cause, it is ordered, that the Baltimore and Ohio Railroad Company, the above named defendant, appear before the circuit court of the United States for the southern district of Ohio, western division, at Cincinnati, in said district, on the tenth day of May, 1890, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, then and there in said court to make answer unto the subject matter of said motion and further to stand to, abide by, and perform such order, direction or decree as may be entered in the premises, and this the said defendant may not omit. And it is also further ordered that copies of the said motion and this order duly anthenticated by the clerk of this court and under the seal thereof, be served upon the said defendant by de-

livering the same to the principle agent of the defendant corpora-

39 tion in the city of Cincinnati in said district, and also to the president or one of the vice-presidents, or the secretary or the general counsel of the said defendant, corporation in the city of Baltimore, State of Maryland, on or before the 7th day of May, 1890.

Done in court, this 1st day of May, 1890.

And afterwards, to wit, on the 1st day of May, A. D. 1890, there was issued out of the clerk's office of the above-named court the following certified copy of order upon motion as to answer and course of procedure, clothed in the words and figures as follows:

40 In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity.

Certified copy of order as to answer.

And now upon the filing of the motion in the above-entitled cause, by the district attorney of the United States for the southern district of Ohio,

p'aying for an order as to the answer of the defendant and as to the method of procedure in said cause. It is ordered that the Baltimore and Ohio Railroad Company, the above-named defendant, appear before the circuit court of the United States for the southern district of Ohio, western division, at Cincinnati, in said district, on the tenth day of May, 1890, at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, then and there in said court to make answer unto the subject matter of said motion and further to stand to, abide by, and perform such order, direction, or decree as may be entered in the premises, and this the said defendant may not omit.

And it is also further ordered, that copies of the said motion and this order, duly authenticated by the clerk of this court and under the seal thereof, be served upon the said defendant by delivering the same to the principal agent of the defendant corporation, in the city of Cincinnati, in said district, and also to the president or one of the vice-presidents or the secretary or the general counsel of the said defendant corporation in the city of Baltimore, State of Maryland, on or before the 7th day of May, 1890.

41 Done in court this 1st day of May, 1890.
Copied from the journal.

Attest:

B. R. COWEN, *Clerk*,

Clerk.

By ——— ———, *Deputy*.

And afterwards, to wit: On the 3rd day of May, 1890, came the marshall of said district, to whom the said order was given, and returned the same into the clerk's office of said court, with his proceedings endorsed thereon, clothed in the words and figures as follows:

Return.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Received this copy of order as to service of petition on the 1st day of May, A. D. 1890, and on the 3rd day of May, A. D. 1890, I served another certified copy of the same upon John F. McCarthy, principle agent of the Baltimore and Ohio Railroad, defendant corporation, in the city of Cincinnati, personally, having the endorsement thereon.

J. H. SIMMONS,
U. S. Marshall, S. D. O.,
By W. H. WILLIAMS, *Deputy*.

1 service ...	2.00
3 miles.....	.18
	$2.18

42 And afterwards, to wit: On the 3rd day of May, A. D. 1890, came the marshall of the said district, to whom the said copy of

motion was delivered, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, clothed in the words and figures, as follows:

The United States of America, southern district of Ohio.

Return of marshal.

Received this copy of motion for order to answer and course of proceedings on the 1st day of May, A. D. 1890, and on the 3rd day of May, A. D. 1890, I served another certified copy of the same upon John F. McCarthy, personally, having the endorsements thereon, the said John F. McCarthy being the principle agent of the Baltimore and Ohio Railroad, defendant corporation in the city of Cincinnati, Ohio.

J. H. SIMMONS,
U. S. Marshall, S. D. O.,
By W. H. WILLIAMS,
Deputy.

1 service ... 2.00
3 miles..... .18

$2.18

43 And afterwards, to wit: On the 3rd day of May, A. D. 1890, came the marshall of the district aforesaid, to whom the said copy of entry was given, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, clothed in the words and figures, as follows:

The United States of America, southern district of Ohio.

Received this copy of order upon motion as to "answer and course of procedure" on the 1st day of May, A. D. 1890, and on the 3rd day of May, A. D. 1890, I served another certified copy of the same upon John F. McCarthy, personally, having the endorsements thereon, the said John F. McCarthy being the principle agent of the Baltimore and Ohio Railroad Company, defendant corporation in the city of Cincinnati, Ohio.

J. H. SIMMONS,
U. S. Marshall, S. D. O.,
By W. H. WILLIAMS,
Deputy.

1 service ... 2.00
3 m. of t__ .18

$2.18

And afterwards, to wit: On the 6th day of May, A. D. 1890, came the marshall for the district of Maryland and filed in the clerk's office of the

court aforementioned the following "return of marshal, district of Maryland," clothed in the words and figures, as follows:

44 In the circuit court of the United States for the southern district of Ohio.

THE INTERSTATE COMMERCE COMMISSION, vs. THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity. No. 4336.

Return of marshal of district of Maryland.

Be it remembered that at the city of Baltimore, in the State of Maryland, on the 5th day of May, 1890, I delivered to C. K. Lord, the third vice-president of the Baltimore and Ohio Railroad Company, a copy of the original petition in the above-entitled cause, authenticated by the secretary of the Interstate Commerce Commission under the seal of said Commission. And on the same day I delivered to the said C. K. Lord a copy of the order in relation to service of the said petition, and also a copy of the motion of the district attorney of the United States for the southern district of Ohio, and also a copy of the order entered by the court upon said motion, all duly authenticated by the clerk of the said circuit court for the southern district of Ohio and under the seal thereof.

Attest:

GEO. H. CAIRNES,
U. S. Marshal, District of Maryland.

And afterwards, to wit, on the 10th day of May, A. D. 1890, there was an entry made on the journal of the court before named clothed in the words and figures as follows:

45 *Entry—z–45.*

THE INTERSTATE COMMERCE COMMISSION vs. THE BALTIMORE AND OHIO RAILROAD COMPANY. } 4336.

This cause came on to be heard on the motion of complainant for an order on the defendant to file its answer and on consideration thereof, and by consent of the defendant, appearing by Harmon, Colston, Goldsmith, and Hoadly, its attorneys, the said defendant is given twenty days from this date for filing its answer, and it is now ordered to file such answer within said time.

And this case is given upon this condition that the said defendant shall on or before the 17th of May, 1890, notify the counsel for the complainant what allegations of the petition it intends in said answer to deny; and, thereupon, that both parties may proceed to take testimony upon all such matters so to be placed at issue before any officer authorized by the laws of the United States to take depositions upon giving to the adverse party notice of the time and place of taking the same as required by law. And all matters as to application for further proceedings in this case are set for hearing in this court on Saturday, May 31st, 1890.

46 And afterwards, to wit, on the thirty-first day of May, A. D. 1890, came the Baltimore and Ohio Railroad Company, by its solicitors, and filed in the clerk's office of the court aforesaid its certain answer in this cause, which said answer is clothed in the words and figures, following, to wit:

47 *Answer.*

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity.

In the circuit court of the United States for the southern district of Ohio, western division.

Answer of the Baltimore and Ohio Railroad Company.

To the honorable the judges of the circuit court of the United States in and for the southern district of Ohio, western division.

This respondent, the Baltimore and Ohio Railroad Company, answering, says:

1. This respondent admits that it is a corporation created, chartered, and existing under and by virtue of the laws of the State of Maryland, having its principle office in the city of Baltimore in said State, and that it is a common carrier, engaged in the transportation of persons and property by its railroad, substantially as is in the petition herein alleged.

2. This respondent further admits that the petition, a copy of which is filed with the petition herein, marked Exhibit A, was filed before the said Interstate Commerce Commission by the Pittsburgh, Cincinnati, and St. Louis Railway Company, and that the respondent filed thereto
48 the answer filed with the petition herein, marked Exhibit B.

Respondent further admits that a hearing was had before the said Interstate Commerce Commission upon the matters of said petition and answer, at which both the said Pittsburgh, Cincinnati and St. Louis Railway Company and this respondent were represented by their respective attorneys.

3. This respondent denies that at the said hearing it was made to appear to said Commission that respondent had violated the provisions of the act entitled "An act to regulate commerce," or any amendment thereof, as stated and charged in the said petition; and further denies that the said Commission duly and legally determined the matters and things in controversy and at issue between the said parties. Respondent admits that said Commission did make a report in writing, a copy of which is filed with the petition herein, marked "Exhibit C;" but respondent says that several of the conclusions of fact stated in said report, which are hereinafter more particularly referred to, are not true, and are not justified by the evidence produced at said hearing, and further says that the conclusions of law contained in said report, and the interpretaton therein given to the provisions of said act to regulate commerce are not correct, and do not accord with the true construction of said act.

4. Respondent admits that the said Commission did formulate the order

and notice, a copy of which is filed with the petition herein, marked "Exhibit D," and that a copy of the said report, order, and notice was delivered to this respondent, but denies that the said order was a legal order of the said Commission.

5. Respondent denies that it has hitherto neglected and refused, and
49 still neglects and refuses, to furnish to said Commission, and to print, post, and file schedules showing the rates, fares, and charges established by it for round-trip passenger excursion tickets issued by it, as required by law, or even as required in and by the said order of the Commission. Respondent admits, however, that it has not wholly ceased and desisted from charging rates for transportation over its lines for a number of passengers traveling together in one party upon one ticket, which are less for each person than rates contemporaneously charged by it for transportation of single passengers between the same points; that the allegations of the petition herein, with reference to the transportation of such parties, so far as they state simply the fact that the same were transported between the points mentioned, are substantially true, and that respondent has not complied with the said order of the Commission so far as it relates to the transportation of parties of ten or more persons upon a single ticket; but respondent says it was and is in no way bound to comply with the said order in that particular, because so much of said order was illegal, beyond the power of said Commission to make, and was based upon an erroneous construction of said act to regulate commerce and upon mistaken findings of fact.

6. And further answering, respondent says that it is the owner or lessee of the railroads on which it carries on the business of a common carrier, and is the owner of the rolling stock and equipment used in its business; that as such owner and lessee, and by virtue of its charter powers it had, at the date of the passage of the said "act to regulate commerce," has ever since possessed and still has the right to carry passengers on its said railroad, and the right to receive a reasonable compensation
50 therefor, which said rights are its private property within the meaning of the fifth and fourteenth amendments of the Constitution of the United States; that respondent is protected by said provisions of the Constitution in the enjoyment of its said property, and can be deprived of the same neither by act of Congress nor by State law, without just compensation made to it; that it has, and has always had, the further right to fix its charges for the transportation by it of persons and property on its said railroads, within the limits prescribed by its charter and the laws of those States in which said railroads lie outside of the State of Maryland, subject only to the decision of the judiciary departments of the State and national Governments respectively upon the reasonableness of the rates so fixed by it. The question of the reasonableness of respondent's rates of charge is a purely judicial question, and no arbitrary rules therefor can be laid down by the Congress of the United States or by the legislature of any State.

7. That for many years prior to the passage of the said "act to regulate commerce," all the railroad carriers in the United States had habitually made a rate of charge for passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charge between the same points, and such lower rates were

universally made at the date of the passage of said act. To carry on this universal practice many forms of tickets were employed to enable different classes of passengers to enjoy these lower rates, and so stimulate travel. To meet the needs of the commercial traveler the thousand-mile ticket was used; to meet the needs of the suburban resident or frequent traveler, several forms of ticket were used, *e. g.*, monthly or quarterly tickets,
51 good for any number of trips within the specified time, and ten, twenty-five or fifty-trip tickets, good for the specified number of trips by one person, or for one trip by the specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists traveling in numbers too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were issued also between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Long experience has proved the soundness of the principle. Under its application grew up the business of commercial travelers, the enormous suburban business, the constant travel between large cities, and the excursion business. Under its application has grown up also the business of traveling companies or parties, which has reached an aggregate of many hundreds of thousands of dollars per annum, and which depends for its existence upon a continuance of the transportation rates under which it has grown up.

8. That since the passage of the said "act to regulate commerce" this respondent has continued as theretofore the practice above stated, of making a lower charge on passenger travel, in consideration of the amount and frequency of the travel, and with that purpose and to accommodate the various classes of passengers, it has continued in use all the forms of ticket described in the next proceeding section. That the charge
52 fixed by it for transportation of parties of ten or more, on a single ticket, has been two cents per mile per capita, which is the same rate charged on thousand-mile tickets, and is a higher rate than it charges on long-distance passenger travel, and excursion travel, and higher than its general rates for suburban travel on time or other suburban tickets. That the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carrier and of the public, because any higher rate would destroy the business. That the business reasons, circumstances, and conditions which induce this respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances, and conditions that induce it and make it its interest to fix a lower charge for transportation of passengers buying mileage tickets, time or trip tickets, and excursionists. That while so-called party-rate tickets are used principally by traveling amusement companies, because no other form of ticket meets the requirements of such companies, yet this respondent has avoided confining such tickets to any class of business by offering them on the same terms to the public at large.

That this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket brokers, by issuing only one ticket for the whole party. And respondent avers, that as such tickets are now issued by it they are not and can not be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket-brokers.

This respondent further avers that it may rightly and legally
53 make a charge per capita for persons traveling on said party-rate tickets lower than its charge for a single passenger, making one trip between the same points, the character, circumstances, and conditions of the service being substantially different, and that the making of such lower charge per capita to the member of the party makes or gives no undue or unreasonable preference or advantage to him, and subjects no person, company, firm, corporation, or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

9. And further answering this respondent says, that the said order of the Commission, to enforce which the present proceeding is instituted, is not a legal order, so far as it relates to so-called party-rates made by this respondent, for the reason, among others, that the said order is based upon erroneous findings of fact and law stated in the opinion of the Commission, and further stated, in the second paragraph of the order itself, as follows: "And also further found that so-called party-rate tickets sold at reduced rates and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of section 22 of the act to regulate commerce, and that when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal."

Said findings assume that the true legal construction of the provisions of the said act to regulate commerce is that stated on pages 4 and 5 of the report and opinion of the Commission, filed as Exhibit C, with the petition herein, to wit: "The design of the act to regulate commerce was to
54 put each individual in the matter of transportation on exact equality, with only such exceptions as the act itself specified."

The Commission, in their report and order, therefore assume that sections 2 and 3 of the act to regulate commerce require that all passengers starting from the same point, and having the same destination, must be charged the same rate of fare per mile, unless the passenger paying the lower rate be one of the classes of persons mentioned in section 22 of the act, or hold one of the classes of passenger tickets mentioned in that section; that is to say, the Commission assumes that the second and third sections of the act lay down an absolute rule to which the twenty-second section creates certain exceptions. The Commission assume that the contemporaneous service is necessarily like, and performed under substantially similar circumstances and conditions, if the passengers between whom comparison is had travel from the same point to the same destination in the same car, and that commercial circumstances and conditions are not to be considered except in the cases provided for by the twenty-second section of the act.

This respondent claims that the construction given by the Commission

to the second, third, and twenty-second sections of the act is mistaken, unsound, inconsistent with the other provisions of the act, and, if adopted, would render the act unconstitutional as beyond the power of Congress.

Respondent says that by the true construction of the act the second section thereof requires the same charge for transportation service only in cases where the commercial circumstances and conditions are substantially similar, and the third section requires the same charge to be made only when a difference in charge would work a prejudice or disadvan-
55 tage to some one without reason therefor. That the twenty-second section, so far from making exceptions to an otherwise absolute rule, was inserted merely as additional precaution to insure the giving to the second and third sections of the act of the construction which Congress intended. That the twenty-second section is a legislative declaration; that under the provisions of the second section of the act, circumstances and conditions of a commercial nature are to be considered, and among such circumstances and conditions, in the case of passenger traffic, the amount of service purchased or contracted for, and the interest of the carrier in stimulating travel are to be considered.

To adopt the Commission's construction of the twenty-second section is to hold that Congress itself deliberately created discriminations, without justice or reason, in favor of certain classes of travelers, as against other travelers who offer to the carrier precisely the same inducements and business reasons for a charge lower than the single-fare charge. Such a construction is inconsistent with the first section of the act and with the intention of Congress, as shown throughout the law. Moreover, as this respondent has shown in previous sections of this answer, the Congress of the United States has no power under the Constitution to fix such an absolute rule as that assumed by the Commission to be fixed by the second and third sections of the "Act to regulate commerce," since by so doing Congress would deprive this respondent of property rights secured to it by the Constitution, which cannot be taken without just compensation paid to respondent.

56 Wherefore, having fully answered all the matters set forth in the petition herein, this respondent prays to be hence dismissed with its costs in its behalf incurred.

JOHN K. COWEN,
HARMON, COLSTON, GOLDSMITH AND HOADLY,
HUGH L. BOND, JR.,
Solicitors for Respondents.

STATE AND DISTRICT OF MARYLAND, *to wit:*

Before me, the subscriber, a commissioner of the United States in and for the district of Maryland aforesaid, residing in the city of Baltimore, this day of personally appeared the of the Baltimore and Ohio Railroad Company, and made oath in due form of law that he is the of the Baltimore and Ohio Railroad Company, defendant in the above-entitled cause, and that the matters and facts stated in the foregoing answer are true, as he verily believes.

And afterwards, to wit, on the 31st day of May, A. D. 1890, the following entry was made on the journal of the court aforesaid, in this cause, clothed in the words and figures as follows:

57 Entry Z, 59.

THE INTERSTATE COMMERCE COMMISSION *vs.* THE BALTIMORE AND OHIO RAILROAD Company.	Circuit court of the United States so. dist. of Ohio.

And now this day this cause came on to be further heard as to orders to be made herein relative to the mode of proceeding herein, and by consent of parties it is now ordered that the taking of testimony of witnesses in this case by the plaintiff or complainant be closed on or before the tenth day of June, 1890, and the testimony of witnesses to be examined by defendant be closed within ten days from said last-named day. But nothing herein shall prevent defendant taking testimony prior to said 10th day of June, A. D. 1890.

58 And afterwards, to wit, on the 9th day of June came the complainant and filed the following depositions, clothed in the words and figures as follows: In the circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION *vs.* THE BALTIMORE & OHIO RAILROAD CO.	In equity.

JOHN K. COWEN, Esq'r,
Attorney for the Defendant.

Please to take notice that on behalf of the petitioner in the above entitled cause I shall proceed to take the depositions of E. A. Ford, at the office of the United States district attorney, in the city of Cincinnati, southern district of Ohio, at ten o'clock in the forenoon on Thursday, the 29th day of May, instant, before Henry Hooper, United States commissioner.

A. G. SAFFORD,
Special Ass't District Attorney,
Attorney for Petitioner.

UNITED STATES OF AMERICA,
District of Maryland, ss:

Be it remembered that at the city of Maryland, in said district, on the 22nd day of May, 1890, I delivered to John K. Cowen, att'y for defendant, notice to take deposition, of which foregoing is a copy.

WILLIAM F. AIREY,
United States Marshall.

59 United States circuit court, southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY. } In equity. No. 4336.

The deposition of Elias A. Ford, a witness produced, sworn, and examined, on the 29th day of May, A. D. 1890, before me, Henry Hooper, a commissioner of the circuit court of the United States for the southern district of Ohio, at the office of the United States attorney, in the city of Cincinnati, Ohio, in a certain cause now pending and undetermined in the circuit court of the United States for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is complainant and the Baltimore and Ohio Railroad Company is respondent, on the part of complainant, and taken under and in pursuance of the notice hereto annexed.

Present on behalf of complainant, A. G. Safford, esqr. Present on behalf of respondent, Hugh L. Bond, jr., esqr., and Edward Colston, esqr., of the firm of Harmon, Colston, Goldsmith, and Hoadley.

It is stipulated by the parties that the testimony may be taken by a stenographer, and reduced to writing.

ELIAS A. FORD, called on behalf of complainant, being first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, deposes and says as follows:

Direct examination by Mr. SAFFORD:

60 Q. What is your age, Mr. Ford?

A. Fifty.

Q. And you residence is——

A. Pittsburg, Pennsylvania.

Q. And your occupation?

A. I am general passenger agent of what are known as the Pennsylvania Lines west of Pittsburg.

Q. Mr. Ford, you may state briefly and generally your railroad experience.

A. I have been in the passenger business exclusively during all the years of my railroad experience, extending back to 1863, about twenty-seven years.

Q. How long have you held your present position?

A. Well, that is ten years (isn't it, Mr. Scull?); I think I went to Pittsburg in 1880, probably ten years ago.

Q. Mr. Ford, has it been the custom, in your experience, for railroad companies to issue a ticket upon which a number of persons could ride from one station to another, in one direction?

A. It has.

Q. Has it been a custom of railroad companies, in your experience, to issue what have been denominated as "commutation tickets?"

A. Yes, sir.

Q. How have the former class of tickets been denominated?

A. If I understand your question correctly, we have been in the habit of calling them "one-way party tickets."

Q. State the difference and distinction which you make, if any between what you call "one-way party tickets" and "commutation" tickets, confining your answer to how these terms were understood prior to April, 1887?

61 A. The practical use in my experience of what is called a "One-way party ticket" has been for a party of say ten or more traveling together on one ticket at a reduced rate, and generally, before the passage of the interstate commerce law, used for the movement of theatrical troupes. Does that answer your question?

Q. Yes; well, you left out whether in both directions or *or* in one direction only?

A. As a rule, in one direction only; but there have, probably—yes, there have doubtless been cases where a theatrical troupe or some special party might have been granted a round trip rate for their transportation; there was used a solid ticket where the tote' number of passengers carried might have been designated upon the face of that ticket, but we would call that kind of a ticket, in ordinary business, a "round-trip ticket," or an "excursion ticket;" this would be different from a "one-way party ticket" from the fact that it was made to return. Shall I go on and tell——

Q. Yes; just go on and explain the distinction.

Your last question w's quite comprehensive. I was answering it in a general way——

Well, just go on and state the distinction, if any.

A. Commutation tickets, in the ordinary acceptance of the term, as my experience has shown, are a special and distinct form of ticket of themselves, or by themselves, used by commutors who live near large

62 cities, and sold at very greatly reduced rates usually; and the tickets are printed so they are good for passage between the stations intended to be covered in either direction. And in our custom and practice, and as they have been regarded by me and the men under me in my experience, they constitute an entirely different and distinct class of tickets from the so-called "one-way party-rate tickets." Have I covered all your points?

Yes, I think so; except as to one to which I shall call your attention. Prior to the passage of the interstate commerce law, in your experience, how were commutation tickets obtained by the party, and how were party-rate tickets—"one way party-rate tickets," obtained?

A. I shall answer all your questions at the same time, shall I?

Q. Yes, sir.

The commutation tickets, that is, the rates for them, vary; sometimes, for instance, as the population of a city increases, and we are appealed to by suburban residents to reduce our rates, we reduce them; and we are in the habit of reducing those rates from time to time according to what appear to be exigencies of the case, the demands of public policy, and so on; and when the rate is decided upon we print a tariff, taking effect usually upon some uniform date, or the end of a calendar month, if you please, in which we set out in figures the price of the tickets, describing the number of rides that may be had; and these tariffs are posted

63 in the stations, and any person may come and buy those tickets, as many of them as he pleases, and have his name written on them—in

some cases that is required, and in others not; but these "one-way party tickets" upon special rates, in parties, theatrical and other parties, are usually obtained upon special orders, or by special arrangements; some through the general passenger agent's office, or through the different passenger agents of the companies represented. I am under the impression, but I am not entirely clear—but if my recollection serves me rightly, our lines, prior to the passage of the inter-state commerce law, did not have a standing order upon the lines, except, possibly, at the very largest stations, whereby a theatrical manager could present the order, and with proper identification could secure "one-way party tickets" at reduced rates—two cents a mile; but as a rule the theatrical manager would have to present a special order, countersigned by ———, issued by———, in order to enable him to secure a "one-way party-rate ticket," a portion of which record would be taken by the agent and endorsed to the auditor, in order to have his account properly certified to, to pass it at the special rate.

A rule that would be applied in no way whatever to the issuing of commutation tickets.

64 Cross-examination by Mr. BOND:

Q. This practice, Mr. Ford, which you describe in your last answer, is that, of course, before the passage of the interstate commerce law; is it not?

A. Yes, sir; I understood that all the questions asked me referred to a time before the passage of that law, and that I was expected to answer with reference to the practice before that time as to what the custom was as near as I could remember it; and I have endeavored to do so.

Q. I merely wished to make that clear, because in your answers you sometimes used the present tense——

A. Well, I beg your pardon, I did not intend to do so, and state now that my answers referred to what was the custom prior to the passage of the interstate commerce law.

Q. It is a fact, is it not, Mr. Ford, that the one-way party rates that are made by your company, the Baltimore and Ohio Railroad Company, and other companies, since the passage of the interstate law, have been open rates, advertised, and in the usual form?

A. Yes, sir, that is true; that is, I can speak of our own lines.

Q. Well, I say all rates made by the railroad companies since the passage of the interstate commerce law have been open rates, have they not?

65 A. Yes; so far as I know they have.

Q. Referring to the time before the passage of the interstate commerce law, Mr. Ford, you have said that there was no regular tariff and no general order on which tickets were issued for the transportation of parties, and yet you have testified that there was in use a one-way party-rate ticket; was not the form of transportation to which you refer a certificate entitling the holder thereof to obtain regular tickets at a reduced rate, or to transport or to carry more passengers in the party than there were individual tickets—than if he held individual tickets?

A. Your question is so lengthy that I do not know whether I can answer it at once; but if I may make a general statement I shall try to cover the ground. I stated, if I recollect rightly (and as I said, I am not per-

fectly clear on the subject, but Mr. Scull can ratify me if I am right or correct me if I am wrong), that my impression was that on our own lines (of course I can only speak of our own lines) there was no general order upon the road, by circular or otherwise, on our lines which would permit anybody to come in and get a one-way party-rate ticket. They had to have some kind of a certificate. Does that answer your question?

Q. Well, I had better make my question a little more definite.

A. Oh, I am now reminded——

(Witness is handed ticket marked XVII. Petitioner's Exhibit No. 1, J. A.——)

66 Q. That is such a certificate as you refer to, is it not, Mr. Ford?

A. I think those were used at one time on our lines; yes, sir, they were. The form has varied, sir, from time to time. I might say that the form of the certificate or order varied at different times; on some the name of the party would be written out, or the certificate would read, "Ticket agent at such a station will sell to John Jones, agent of such and such a theatrical company, special one-way party rate tickets at the rate of two cents per mile, per capita;" something of that sort; and at stations where we did not have special agents, at one time, he might be instructed to issue single tickets, marking across their face the word "Theatrical;" but conductors would be instructed not to take those tickets separately, but always for a party of ten or more, traveling under that rate.

Q. Mr. Ford, it was the general practice, was it not, at the time of the passage of the interstate commerce law, and for years prior thereto, for the railroad companies with which you were acquainted—connected and acquainted—to transport passengers at a lower rate, when the contracted carriage was for frequent carriage, or for carriage of a large number, was it not?

67 A. Yes, sir.

Q. The tickets that you have described as issued, and used principally by suburban residents, were sold at a rate very much lower than the regular single-fare tickets, were they not?

A. Yes, sir; that is, the rate per trip was very mu h less than the regular single-trip fare.

Q. What was the principle on which those tickets were sold?

A. Well, so far as the lines with which I have been connected are concerned, the principle upon which these tickets were sold might be called a matter of policy, or effort to build up travel, and create travel along our lines, by offering very cheap rates of transportation to suburban residents; favoring locality, if you please. That is to say, railroads that I have been connected with, anxious to build up their suburban travel, and have people build up along the line of their road, carried them at wholesale rate, as you might possibly call it, for the sake of having them more or less identified with the line on which they lived, and the selfish purpose, I may say, of having them ship over their road, and of inducing them and their friends to buy single tickets over our lines for through journeys.

68 Q. Then the business consideration moving the railroad company to make this lower rate per trip in favor of suburban residents, was the frequency of the travel, and the creation of travel—the creation of additional travel?

A. Yes; it might be so, partly, considered; and you used the word

wholesale a while ago, and I am perfectly frank to say that it might also follow, upon the general principle, that we could afford to do wholesale business at a lower rates than retail; but the governing reasons would be the other, because we have very few places where the commutation business is in itself profitable. In fact, we run a great many of our commuters' trains at a loss.

Mr. COLSTON:

Q. It is largely in deference to public demand that you run those trains?

A. Yes, sir; very few of our commuters' trains are profitable, and we have to run a number of non-paying trains; as a whole, the commutation business is not profitable from an exact money standpoint; but indirectly we think it is, for the reasons that I stated first.

Q. There were issued by your lines, before the passage of the interstate commerce law, other reduced-rate tickets, were there not?

A. Other than what, please?

Q. Other than those you have already mentioned. I am referring to mileage tickets.

69 A. Yes; mileage tickets and excursion tickets.

Q. The business principle on which they were issued was substantially the same, was it not?

A. Yes; I should say so.

Q. And all these various forms of tickets were simply applications of the same general business principle, were they not, which you have called the wholesale principle, applied to the needs of different classes of passengers?

A. No, sir; not in the case of thousand-mile tickets, for instance. Do you want me to answer now as before or after the passage of the interstate commerce law?

Q. As before the passage of that law; all my questions relate to a time prior to the passage of that law.

A. Before the passage of the interstate commerce law it was customary for the railroads to issue a great many passes to influence freight shipments, and that was one of the difficulties that the passenger department always had to contend with—the depletion of its revenue on account of passes issued to control freight. And the result was that our best Pullman cars were taken by dead-heads, traveling on passes, on account of freight. The law passed, and passes could not be issued any more; but it was decided that mileage tickets could be issued at reduced rates, provided they were open to the public, then——

Q. Mr. Ford, that is not responsive to the question I asked you——

70 A. I am trying to state in a general way—well, often before the passage of the interstate commerce law, mileage tickets were issued for the reasons, I say, if we thought a man not entitled to a pass, the passenger agent had a right to issue a mileage ticket to him; our rate was two cents per mile to shippers—or whatever the freight department might say. And we often sold mileage tickets as low as one cent per mile to increase the freight business; but all this was before the passage of the law, it was to control freight. Does that answer your question? I understood the point to be, did we issue mileage tickets for the purpose of increasing our passenger business; no, it would decrease our revenues.

Q. Is it not a fact, Mr. Ford, that prior to the passage of the law your company sold thousand-mile tickets to the general public at the rate of two and a half cents per mile?

A. Yes, sir.

Those general tickets were not sold for the purpose you have stated, but went into the influence of the freight business that you have referred to, which was advanced by selling those same tickets at a lower rate than two and a half cents per mile?

A. It might have been. I think we have sold tickets as low as two cents per mile to the general public also. I am perfectly willing to say, and possibly it may cover the point better, that in the case of extremely large parties seeking transportation, where our ordinary one-way rate would be two cents per mile for a party of ten per capita, we, in common custom with other railroad companies, have made rates as low as a cent and a half per mile per capita, for extremely large parties, and possibly as low as one cent per mile, in the exigencies of competition, so to speak.

71 Q. I am referring now more particularly to the form of ticket, Mr. Ford. You have testified as to this general practice, and general principle of the passenger business prior to the act, and I ask you whether these forms of ticket—the mileage, the party-rate, as you call them, the commuters, as you have defined them—were not adaptations to apply this general principle to different classes of travel. For instance, it would be impossible and generally inconvenient for a commutor to use a mileage ticket, would it not? And a commutor's ticket would not, of course, suit the needs of a commercial traveler?

A. No, sir; there would be a distinction there, of course. A mileage ticket——

Q. Isn't it a fact, Mr. Ford, that the business principle on which all these tickets were issued was substantially the same?

A. No, sir; the exception is the one-way party-rate ticket made for a special purpose, and generally to move theatrical troupes at a lower rate than ordinary people. It was especially for that. For instance, in our custom, prior to the passage of the interstate-commerce law, we did not, as a rule, give such a rate to a party of business men; if a business man would come in and say that a party of business men were going such and such a place, and ask us to give them reduced rates if they would get up a party of ten, as a rule we would say no. But if a theatrical manager would come along and ask for reduced rates for a party of ten or more, for the purpose of enabling them to travel at reduced rates—at living rates, you might say—so as to play, we were in the habit of favoring them. And that is what our counsel has called "discrimination," and is arguing his case on. I make the point of distinct difference in my mind as between commutation tickets, excursion, and thousand-mile tickets,

72 and one-way party-rate tickets, as it applied to our business in the past prior to the passage of the act.

Q. You understood, prior to the passage of the act, that those lower rates were given in order to enable party travel, so far as it was theatrical at any rate, to more——

A. It was principally done to encourage theatrical travel, and related almost exclusively to that class of travel.

Q. The reason, then, that you made this distinction between the ten

business men and the ten theatrical men was that you thought the ten business men could and would go at the regular rates, while you thought that to charge these theatrical parties the regular rates would prevent their possible traveling?

A. Partly so, sir, but not entirely that. Generally it was done to curry favor with the theatrical troupes, to favor a special class whose demands might have been greater than the business men, perhaps. That is, their importunities were greater, and they tempted us, and we fell.

Q. It was the fact, was it not, that these theatrical companies did a great deal of traveling?

A. Yes, sir; as all traveling companies, theatrical or otherwise.

Q. And that is what you mean by saying that it was important for the railroad companies to have their favor?

A. No, sir; it is one of the peculiarities of competition more than that. It is a business feature that is sought after by all railroad companies, or was prior to the passage of the act, and cultivated a great deal. The rates were very often lower than two cents a mile for that class.

73 Q. Mr. Ford, upon the tickets that you issued before the passage of this act, for the transportation of suburban travel, were good for a specified number of trips, were they not?

A. As a rule, yes, sir. In fact, I may say all. You refer to commutors tickets?

Q. What you call "commutors tickets." Mr. Ford, did your companies at that time sell package tickets?

A. I am not sure about that. Mr. Scull, will you help me to refresh my memory? I do not want to swear to anything that is not true, and I cannot recollect distinctly as to whether we did or not. Mr. Scull, did we sell package tickets at that time?

Mr. SCULL. Yes, we sold a strip ticket, ten rides for a dollar, similar to street-car tickets.

The WITNESS. Yes, sir; we sold a package ticket at that time which might be folded up into a package; it was a strip ticket, ten rides for one dollar, good between commutors' points, as we call them; between suburban points in the city.

Q. You also sold ten, twenty-five, and fifty ride tickets, did you not?

A. Similar to that. Yes, sir; some of them with fifty-four and some with sixty-two trips on; with the number of rides appeared on the tickets.

Q. On those tickets the holder could take employés or others with him, could he not?

74 A. As specified upon the face of the ticket; yes, sir.

Q. What do you mean by that?

A. Nearly all of our commutation tickets are made "not transferable."

Q. Nearly all?

A. Yes; nearly all. They are made not transferable, and the purchaser signs his name. I say nearly all, but I may be wrong about it; however, I think that nearly all——

Mr. SAFFORD:

Q. You say "are," Mr. Ford; don't you mean "were?"

A. Yes, sir; I mean they were, of course. The head of a family would sign his name to the ticket, and that ticket would be good when presented

by himself or by any member of his family or employé. The package ticket that you have referred to were not of that kind. They were good for anybody who presented them. They were sold at a higher rate. I remember one kind we had of the higher rate tickets, "good to bearer," from one station to another.

Mr. BOND:

Q. Were not such tickets sold also between some of the large cities in your territory?

A. They may have been between Pittsburg and Allegheny, but not between cities fifty or one hundred miles apart.

Q. I will ask you, Mr. Ford, if there were not instances where you did sell those tickets between cities that were that far apart?

75 A. No, sir; it was not customary; no, sir. In other words, we never issued a commutation or ten-trip ticket between Columbus and Cincinnati, one hundred and twenty-five miles.

Q. All you have stated, Mr. Ford, relates to a time prior to the passage of the act?

Yes, sir.

Q. Will you produce and hand to the commissioner, to be attached to your deposition, the forms of the ten-trip and strip-tickets to which you have referred?

A. Yes, sir; these are the ones you refer to. (Tickets produced by witness are hereto attached, marked "E. A. F., Exhibit No. 1," and "E. A. F., Exhibit No. 2," respectively.)

Mr. SAFFORD:

Q. These tickets are good, as you have described, and good in the hands of the bearer?

A. Yes, sir.

Mr. BOND:

Q. Mr. Ford, on such a ticket as that (a strip-ticket) an individual with nine others could ride one way between points named, could he not?

A. Yes, sir. Well, on looking at the tickets, the one marked "E. A. F., Exhibit No. 2," would permit that; but the one marked "E. A. F., Exhibit No. 1," would not, because the condition specified upon the face of it would prevent it, viz: "This ticket and each coupon attached thereto will entitle the bearer to one passage between Chicago (D), Ills., and South Chicago, Ill." What I mean by that is this: That ticket could not

76 be used by a party, except by deceiving the conductor; it would not be used. The coupons here are not good if detached, and the——

Q. Do you mean——

A. ——and the conductor would not take that for a party of ten unless he disobeyed instructions, or unless he was deceived—he could not *tare* off one for you, and one for you, and one for you, because that would be carrying a party of ten at reduced rates, and——

Q. I am speaking of before the passage of the act.

A. All my replies relate to a time prior to the passage of the interstate commerce law.

Q. Suppose you passed the tickets from hand to hand, as the conductor came along, would not each man have a right to present it?

A. No, sir, he would not on our lines. I stated plainly that it could not be done in the past without violation of our instructions to the conductors, and, therefore, it is not a party ticket.

Mr. SAFFORD:

Q. But as to the other one, you say yes?

A. Yes, sir.

Mr. BOND:

Q. Will you please state what conditions there are on that ticket, or what instructions that would prevent the handing of that ticket from hand to hand among a party of ten?

A. Just as it reads?

Q. It reads "good for bearer."

A. But the bearer is supposed to be the owner; the man that purchased it.

77 Q. How would the conductor know?

A. He would read the conditions upon the ticket, and unless one of the men hid under the seat, and one of the men was in the next car, and they had a detective running between, to present the ticket, I don't see how it could be done. You see, it is not good with the coupon detached, and that clause is put on there on purpose to prevent that very thing. The rate at which those tickets were sold, if they could possibly be used for ten persons at one time, would not have been sold at that rate, we never would have done it. Of course, I suppose we have been deceived at times. It is not a good-for-bearer ticket with detached portions. I have not read the conditions on the back of ticket marked "E. A. F., Exhibit No. 2." After reading same I find that under a misapprehension I testified wrong, and should now like to correct my former statement, and say in answer to the question, after having read the conditions on this ticket, that ticket No. 2 could not be used for a party of ten different persons at the same time without deception or fraud. The conditions on the back, which are somewhat lengthy, cover that. It is not transferable. The conductor will punch one off, for one person, each time. The ticket marked "E. A. F., Exhibit No. 1," is what is called in railroad parlance "Ten-trip good-for-bearer ticket," and the same would describe ticket marked "E. A. F., Exhibit No. 2."

Q. At the time of the passage of the interstate commerce law the business done on the railroads for these reduced rate tickets was quite a large part of their business, was it not?

78 A. A large part of what business?

Q. Of the passenger business.

A. No, sir; not in our experience; not in the experience of the Pennsylvania lines west of Pittsburg. Of course, I suppose you mean my testimony to relate to that and not to other rates?

Q. The commutation business on your lines was not large?

A. On some points it was; at the terminal ends of the lines it was quite large; yes, sir.

Q. Can you give us any idea of the amount?

A. No, sir; not from memory, and I could not give you the number of

passengers carried per year in that way; we did not keep that separately. I may have misunderstood your question. I understood your first one to apply to theatrical——

Q. No; I mean all the commutation tickets. That formed a large portion of your business, did it not?

A. No, sir; not a large portion, that is, so far as the revenue is concerned. There are a great many passenger or commutation rates that yield very small revenue. The relative proportion of that to the regular passenger business would be very small.

Q. Mr. Ford, won't you give your definition of "commutation tickets"?

A. I have done so, I think, quite fully.

Q. Well, do it again, won't you?

A. Well, my understanding of a commutation ticket was a ticket that was sold at a reduced rate for the transportation of the suburban residents or the members of his family between city and suburban points near to large cities. Commutation tickets sold at reduced rates on account
79 of the reasons I have stated before; I will repeat them if you want me to.

Q. No, sir; it isn't necessary. In that category you include fifty-ride tickets, twenty-five-ride tickets, and ten-ride tickets, when sold in that territory.

A. Yes, sir.

Q. Suppose a fifty-ride ticket were sold between Chicago and Milwaukee at a reduced rate, would that be a commutation ticket?

A. I should so regard it, provided there was a series of commutation tickets graded as to the number of passengers, numbers, and limits in price. But if there were only one form, then I should say not.

Q. Suppose it was only a fifty-ride ticket, in every respect precisely like the fifty-ride tickets, but good between Chicago and Valparaiso, used just as the fifty-ride tickets——

A. I should say that the form of fifty-ride tickets between Chicago and Milwaukee, if sold at a reduced rate, and made good for one or more persons, and sold to anybody, would be what might be called commutation tickets, that is, meaning a ticket similar to those I have described as commutation tickets.

Q. Then it is not a fact that they are sold to suburban residents only?

A. In that case, not unless you consider Milwaukee as a suburb of Chicago, and I believe they do so consider it, in Chicago.

Q. Suppose it was between New York City and Philadelphia. I don't think either party there claims that the other is a suburb of it.

A. I believe they do contend about that. A fifty-mile ride trip-
80 ticket, the same as I have described, would be a commutation ticket in my judgment, yes, sir; between New York City and Philadelphia. By that I mean the full definition of commutation that I gave in first testimony; good in either direction.

Q. Then it is not the territory in which a ticket is used but the travel on the ticket that brings it within your idea of the commutation ticket?

A. No, sir; that is not it. Commutation ticket, as I have described it, don't matter what point it may be, is as I have already stated.

Q. State it over again, please?

A. A commutation ticket is good for one or more persons, and good in either direction, and purchased at reduced rates.

Q. Mr. Ford, is it not a fact that you would, prior to 1887, sell those tickets between any point on the line?

A. What tickets?

Q. Reduced rates, family, and trip tickets.

A. I think we did, in special cases, sir. My recollection is that at one time it was a fifty-trip ticket we sold between any station—Mr. Scull, how was that? Yes, sir, we did.

Q. Mr. Ford, do you think that the carrying of a party of ten or more at a reduced rate is unjust or unreasonable, from a business standpoint?

A. No, sir, I do not, provided that rate is open to all alike—all classes, I mean.

81 Redirect examination by Mr. SAFFORD:

Q. Mr. Ford, in your description of commutation tickets (and these fifty-trip tickets), suppose that such a ticket was not entirely used up during the time for which it was issued, what would the balance of it be good for?

A. In our ordinary rules, as they existed before the passage of the interstate commerce law, we would not extend the time or redeem the ticket, except in case of sickness or something of that kind.

Q. These trip tickets or package tickets were issued in a certain definite number, ten, fifteen, twenty-five, fifty, and I think you said sixty-two——

A. No, sir; please state what kind of ticket you refer to.

Q. These trip tickets, these package tickets?

A. What I call commutation tickets?

Q. No, sir; these tickets (showing witness tickets marked "E. A. F., Exhibit No. 1, and "E. A. F., Exhibit No. 2"), were they issued in even numbers, in certain definite numbers, so prescribed by the rules of the company for these different kinds?

A. Yes, sir; and the tariff and the rate made accordingly, made according to the number on the tickets.

Q. Suppose that a party not coinciding with the number which was permitted to be sold, was there any method by which these tickets could be split up so as to cover a definite number of persons, these party tickets?

A. No, sir; not except by fraud, or by evasion or the regulations of the company.

Q. And if a party should number fourteen, and the person
82 bought a twenty-trip ticket, he would be left with six tickets upon his hands, which he would be required by the rules of the company to use within the time limited, by the ticket, or forfeit the right to use them, would he not?

A. Yes, sir; on limited tickets. Tickets 1 and 2 (referring to Exhibits "E. A. F., Nos. 1 and 2") are unlimited; that is, they are good for one year.

ELIAS A. FORD.

Sworn to before me, and subscribed in my presence, this 4th day of June, A. D. 1890.

HENRY COOPER,
U. S. Commissioner.

84 THURSDAY, *May 29th*, 1890—three o'clock p. m.

The following depositions, on behalf of respondent, are taken by consent, formal notice being waived, subject to general objection as to immateriality and irrelevancy:

WILLIAM B. SHATTUCK, called on behalf of respondent, being first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

Direct examination by Mr. BOND:

Q. State your name, age, residence, and occupation.

A. Forty-eight; William B. Shattuc; place of business, Cincinnati; residence, Madisonville, Ohio.

Q. And your occupation?

A. General passenger agent of the Ohio and Mississippi Railroad.

Q. Will you state briefly your railroad experience?

A. I have been general passenger agent since 1863. I was with the Atlantic and Great Western Railroad Company until about eight years ago, when I took service with the Ohio and Mississippi Railroad Company as general passenger agent.

Q. Prior to the passage of the interstate-commerce law to regulate commerce, in 1887, what was the general practice of railroad companies as to making reduced rates for the transportation of passengers?

A. Well, the question is pretty broad.

85 Q. I will make it more definite by adding: in the transportation of passengers traveling frequently or in numbers.

A. I think that the rule was almost a universal one that where parties were traveling together, to any considerable number, that we gave them reduced rates, but whether or not there was an established rule classifying the business I do not know; but the rule for organized (regularly organized) parties that were traveling together the railroad companies made them a rate, generally of two cents a mile. On the roads that I was with, and the companies with which we affiliated, we had regular cards entitling them to a discount; professional cards, making two cents a mile, presented anywhere on the road they wished to.

Q. Upon presentation of that card what was done.

A. They presented the card to the conductor; the conductor was ordered to honor, say, ten passengers on tickets for a fewer number—in other words, the conductor would honor that card; would transport ten persons on the presentation of that card and tickets for less than ten. Instead of reducing the rate, you know, they would present a combination card, which authorized the conductor to take less tickets than the number of people traveling on that card, which was equivalent to a reduction made, and comes to the same rule as commutation tickets. In many cases we had a regular party rate, graded according to the number of travelers. For instance, between here and Louisville and Louisville and St. Louis we sold tickets according to the number of people traveling, and that was not changed until the passage of the interstate-commerce law; then we made it uniform so as not to discriminate as to numbers. We considered a commutation ticket, or commutation rate, any ticket that gave evidence of one or more than one passage on it for less than the regular rate.

86 Q. Do I understand you to testify that prior to the passage of the interstate-commerce law your understanding of the term "commutation ticket" included all the tickets sold at a commutation rate; and that the commutation rate was a rate made lower than the regular single-fare rate, made in consideration of the frequency of the travel, or the number traveling?

(Counsel for complainant object to the latter part of the question, which is, therefore, omitted, and the question made to read as follows:)

Q. Do I understand you to testify that prior to the passage of the interstate-commerce law, that your understanding of the term "commutation ticket" included all the tickets sold at a commutation rate?

A. My understanding was that any ticket that was sold for less than regular rates, for the transportation of one person for more than one trip (or for more than one person for one trip) was a commutation ticket, and a commutation rate; in other words, a mileage ticket, a ten-trip ticket, a party ticket, and all those classes of tickets, were understood as being commutation tickets, or commutation rates. For instance, we have had on all the roads with which I have been connected, and on other roads with which I am conversant, tickets designated in the commutation tariff as "family tickets," school-children's tickets, fifty-four ride tickets, and so on. The tickets themselves didn't have "commutation on them," as indicating that they are commutation tickets, sold at commutation rates; but I have always regarded all those tickets as being commutation tickets, at commutation rates.

87 Q. Mr. Shattuc, does your company issue a so-called "party-rate ticket" to-day? if so, please state the form of it, and the conditions under which it is issued.

A. We sell a ticket called a party-rate ticket to any point on the line of our road, for a party of ten or more, at the rate of two cents a mile. This ticket is sold to anybody who wants it for a party of ten or more. The rates are advertised in our office since the passage of the interstate-commerce law, and we have taken off those other tickets that were equivalent to it, on account of being more easily changed, and being in strict conformity with the interstate-commerce law, and equivalent to other tickets (which amounts to the same thing)—the same purpose.

Q. Was there, or was there not, Mr. Shattuc, such a distinct and definite form of ticket generally used before the passage of the interstate-commerce law?

A. I don't think it was used, as generally used as it is now, the identical ticket; the form of the ticket is changed very often; but the same results were obtained before the passage of the interstate-commerce law, by commutation tickets and rates; in other words, the passengers had exactly the same facilities as they have now, on a little different plan. And so far as the Ohio and Mississippi is concerned, we used both, we used the party-rate ticket as low as five in numbers.

Q. This present form of ticket is fixed by agreement, is it, of the lines in your territory?

A. Yes, sir.

Q. The Central Traffic Association?

88 A. I think not by the Central Traffic Association. Our ticket is arranged between the Vandalia and the Ohio and Mississippi,

the Cincinnati, Hamilton and Dayton, and the Big Four; and it is also in use between here and Chicago, and the Pennsylvania road and the Monon route and the Big Four; at least I know the Monon and the Big Four use it; it is in their contract. And it was, at one time, authorized by the Central Traffic Association, whether it is still, or not, I don't know.

Q. Mr. Shattuc, is it, or is it not a fact that the business and commercial reasons, circumstances, and conditions that induce you as railroad men to issue these party tickets, to make these party rates, are the same as the reasons, circumstances, and conditions that induce you to make reduced rates for mileage tickets, and the other classes of tickets that you have mentioned?

A. Yes, sir. If the Ohio and Mississippi was the only line in the United States, it would wish to issue the party tickets simply for the purpose of inducing trade. Simply as a matter of policy, without regard to competition at all. Parties of ten are entitled to a better rate than a single passenger. We would do it as a matter of policy and to increase our revenue.

Q. You regard it, then, as sound railroad policy. How about the rate of two cents a mile? Do you regard that as a reasonable rate?

A. Yes, sir; for a party of ten, yes, sir. If a single passenger pays three cents a mile, two cents a mile is a fair and reasonable rate for a party of ten. That ticket is used very largely on our road, by lodges and associations of different kinds, by theatrical companies, and by all classes of traveling companies.

89 Q. If you should withdraw the two-cent rate for parties of ten, and substitute for it a higher rate, what, in your opinion, would be the result as affecting the interests of the railroad, and as affecting travel generally over your road?

A. Well, you take just one class of travel, there would be no trouble in arriving at a conclusion—that is the professional travel; it would reduce that at least fifty per cent. if not seventy-five per cent. Just how much it would reduce our commercial travel would be purely a matter of opinion, because there is nothing to go on. But if, as you say, if the two-cent per mile rate were withdrawn and a higher rate substituted, wherever we came in competition with the river, it would be simply suicidal for the railroad companies; the business would all go by the river; they can always get a lower rate on the river for parties than for single passengers. So withdrawing that rate would simply take from us all that class of travel.

Q. Can you give us any idea, Mr. Shattuc, of the aggregate amount of travel in parties on your line?

A. Well, I can give you a better history of the number of professional men who travel on these tickets than of regular commercial travel. We earn on that class—the professional—of travel between here and Louisville, Louisville and St. Louis, and here and St. Louis, a good many thousand dollars a year. The loss of that business would be a very serious loss to the Ohio and Mississippi Railroad Company.

Cross-examination by Mr. SAFFORD:

Q. Mr. Shattuc, *is* I understand you, you have qualified what you call "commutation tickets" by saying "commutation tickets" or "commuta-

tion rates;" won't you give me your reason for making that qualification in your testimony?

90 A. Why I call them that?

Q. You say "commutation tickets, or commutation rates;" won't you give me your reason for so qualifying it? Why do you say "commutation ticket or commutation rate?"

A A ticket may be sold at a commutation rate which has not printed on the face of it "Commutation ticket."

Q. Well, your reason for making that qualification in your testimony, if I understand you, is because of the lack of the word "Commutation" being on some of the tickets. Am I right?

A. I gave my answer to the attorney to express exactly my views as to what are commutation tickets or rates.

Q. You don't understand me, Mr. Shattuc. You stated in your definition—you spoke in your definition of "commutation tickets or commutation rates," and, so far as I remember, in every instance where you used the words "commutation tickets" you qualified them by adding "or commutation rates." Now, I want to know what your idea was in so qualifying them.

A. My idea was to so express myself that you gentlemen could understand. I think I have expressed myself in a way that any intelligent person could under-stand.

Q. Mr. Shattuc, if I understand you, the distinction which you make in regard to a commutation ticket is that it is a ticket which is sold at a reduced rate of fare——

A. I beg pardon; I said a commutation ticket would be good for one person for more than one ride, or for more than one person for one ride, sold at a reduced rate.

Q. As applied to all kinds of tickets?

A. Certainly.

Q. What difference—what is your definition of a commutation ticket?

91 A. I have already given my definition of it.

Q. I should like you to give it again, please.

A. My definition of a commutation ticket is a ticket for one passenger good for more than one ride, or for more than one passenger for one ride, sold at a reduced rate.

Q. Yet in your testimony in chief you classed mileage tickets as a form of commutation tickets, didn't you?

A. Yes, sir; and it is undoubtedly true, too.

Q. Then you call a mileage ticket a commutation ticket?

A. Positively and certainly, yes.

Q. And you call a party-rate ticket a commutation ticket?

A. Most certainly.

Q. Do you, also, call an excursion ticket, sold at a reduced rate of fare, from Station A to Station B, for instance, a commutation ticket?

A. For more than one person?

Q. For more than one or for less than one. For more than one, or for one.

A. For more than one I would.

Q. For one person would you?

A. It would be a commutation rate, but hardly a conmutation ticket.

Q. But you say that a mileage ticket is a commutation ticket?

A. Undoubtedly.

Q. Without the qualification which you have in your mind of its being a commutation rate?

92 A. Undoubtedly; because a mileage ticket is good for more than one person, good in more than one direction, and more than one trip and sold at a reduced rate.

Q. In your experience, Mr. Shattuc, is, was or has it been usual for mileage tickets to be good for more than the persons named on the ticket?

A. But there has been no regular established rule limiting that to one person. We put on more than one person sometimes.

Q. Are they not generally—I say generally—limited to members of a firm; to members of the same family, including servants; and, occasionally, to employés of a firm?

A. Mileage tickets between here and Chicago are good for the bearer.

Q. I am asking you, Mr. Shattuc, as to the general way in regard to the issuance of mileage tickets.

A. Mileage tickets are sold to any one who asks for them, and in special cases they put in more than one name; whether those names should be limited to the members of a family, I know of no rule to limit it to that.

Q. Mr. Shattuc did you ever hear any one, in any railroad convention or party of railroad men, call a mileage ticket a commutation ticket?

A. I don't base my judgement on what I hear; I was asked what my judgement was.

Q. Then as I understand you, Mr. Shattuc, you are not giving us, and have not pretended to give us, the ordinary understanding or ordinary acceptation—that is to say, what the definition of the term "commutation" is or the word means—but you have given us your judgement as to what it ought to comprehend; am I right?

93 A. Not in the way you put it; no.

Q. Well——

A. Suppose that you should come to the Ohio and Mississippi Railroad office, as an expert railroad man, and should say to me "Do you have commutation ticket rates on your road?" I should say, "Yes." Suppose an attorney here should ask me the same question, not knowing what you mean by that, I should give the same answer as I have given here; exactly as I have answered here.

Q. You have not yet answered my question, Mr. Shattuc.

A. It would be very hard for me to tell what other railroad men think.

Q. Have you attempted to give a popular definition of the term "commutation?"

A. I attempted to give what I believe any disinterested person would give as the definition of the term.

Q. You are interested in this matter because, according to your testimony, you are still issuing these party-rate tickets?

A. We are not interested at all. Because our attorneys tell us that we may do so; that it is not a violation of the interstate commerce law for us to do so.

Q. You are interested in the question in this case?

A. No, sir; I am not.

Q. Your railroad is interested?

A. Our railroad is not here testifying.

Q. I am asking you if your railroad is interested in the question in this case?

A. I say that our railroad company and all the rest would suffer very seriously if the ruling of the Interstate Commerce Commission should be sustained.

94 Q. Then your railroad company is interested in this case?

A. Not to the extent of changing my testimony at all.

Q. I have not so intimated at all. Does your railroad run through—— where does your road commence?

A. It commences in Cincinnati, and runs through Illinois, Indiana, and Kentucky, and to Missouri.

Q. You run through some outlying villages, I suppose?

A. Yes, sir.

Q. And you issue more or less commutation rates as applied to that territory?

A. Yes, sir.

Q. By whom is the territory defined within which those commutation rates should come?

A. By me.

Q. Does that apply to all the portions of your road?

A. Yes; certain classes of them; that is, according to whether there is any demand for them or not. We don't usually publish a tariff unless there is a demand for tickets.

Q. You sell a reduced rate ticket to people who live in the suburbs, which entitles them to ride in and out over your road, at a reduced rate of fare?

A. Yes; and from any other town on the line of the road.

Q. Do those rates apply to all the stations on your line into Cincinnati?

A. They would if there were a demand for it.

Q. Do those rat's apply to all of the stations on your line of road?

A. We do not have the same rate to all stations on the road.

Q. Mr. Shattuc, will you be kind enough to answer my question?

95 A. I can't. If you will ask me as to any particular part of the road——

Q. I will ask you whether this commutation rate which permits persons to travel from stations outside of Cincinnati into Cincinnati at a reduced rate of fare applies to all the stations on your road.

A. You mean the party ticket?

Q. I mean a ticket which applies to all stations of your road, permitting your patrons to ride over your road from those stations into Cincinnati and back to their homes? Whether that applies to all stations on your road?

A. Certainly not. It is not uniform, simply because business does not demand it.

Q. And I understand you say that you have a district mapped out on your road within which those rates apply?

A. I don't know what you mean. I have said that there is no limit to

that. We have different tariffs, and different classes, according to the classes of the trade.

Q. I want to know from you, Mr. Shattuc, now that you have said that there are some stations where you don't have these tickets which permit persons to travel into Cincinnati and back to their homes at a reduced rate of fare since you have said that, will you now please tell us what stations do have that favor accorded them?

A. We have a regular tariff for commutors rates published as far west as Aurora; then through tickets at a higher rate are published at every station on the road.

Q. Those tickets which you call commutors' tickets, form one class of tickets, don't they?

96 A. I think all tickets sold at a reduced rate for one person for more than one passage, or for more than one person for one passage, is a commutation ticket.

(Counsel for complainant objects to the answer as irresponsive to the question.)

WITNESS (continuing). Certainly they form one class.

Q. Mileage tickets form another class?

A. No, sir; I think not.

Q. You think they belong to exactly the same class as the other?

A. They all come under the same family—the same head; they vary according to the rates and conditions.

Q. Do they belong to the same class as the others?

A. Yes; as commutation tickets; all under one general head.

Q. A party-rate ticket; does that belong to the same class?

A. Certainly. It is a commutation ticket, in my opinion.

Q. What do you mean, then, in your testimony, by speaking of commutation tickets, party-rate tickets, and mileage tickets, and all of those classes?

A. All of those forms, if you please.

Q. You did not mean to say, then, that those different kinds of tickets form different class's, in the former part of your testimony?

A. I mean to say just what I did say; and I have been in the business long enough to express an opinion about it.

Q. Did you mean to have us understand that there was only one class in regard to those tickets?

97 A. I mean to say that I consider them as commutation tickets of different varieties, perhaps of different classes, if it serves better.

Q. Do you say, now, "perhaps of different classes"?

A. If you like that term better you can use it.

Q. That was a term of your own choosing, Mr. Shattuc?

A. Of my own choosing? Well, yes; I did use it.

Q. You will admit that you used that term?

A. Yes; I will admit that I used it myself.

Q. Are they generally considered, among the railroad people that you come in contact with, as belonging to separate classes?

A. I believe, as a rule, they would consider them all as commutation tickets.

Q. And not as belonging to separate classes of tickets?

A. If there is a half-dozen different tickets, under one class, they have to be of different forms.

Q. That is not answering the question?

A. Then I don't understand what you mean.

Q. Then you do not consider that a one-way party-rate ticket is a separate and distinct class of ticket from what is known as a commutation ticket?

A. If a party should come into our office and ask for a commutation ticket he would not ask for a party-rate ticket. I was asked the question as to whether I considered the party-rate ticket a commutation ticket. I say, yes; most assuredly. They are all commutation under differnet classes; one is termed a party-rate ticket and the other is termed a commutor's ticket. Then we have a commutation ticket which is a fifty-four ride ticket; that is not called a commutation ticket, although it is one, but is called a fifty-four ride ticket. A person coming in and wanting
98 one of those tickets would ask for a fifty-four ride ticket, and a person coming in——

(Counsel for complainant objects to the answer of the witness as irresponsive too the question and as irrelevant. Question read to witness by stenographer.)

A. I consider that it comes under the head of commutation ticket.

Q. Do you consider it to be a separate and distinct class of ticket from a commutation ticket?

A. No, sir; it is a commutation ticket at a commutation rate; simply different from others in name.

Q. You think that the only difference between this ticket and the other is a difference in name, do you?

A. Except some difference in the application, as it is used.

Q. Now, Mr. Shattuc, you say that you now use a party-rate ticket for ten or more persons?

A. Yes, sir.

Q. Traveling in one direction over your road at a reduced rate of fare?

A. Yes, sir.

Q. So far as these party-rate tickets are concerned, who determines or who has determined how many shall constitute a party?

A. Well, the rules of the road determine that.

Q. A rule which is prescribed by the controlling authorities of the different roads?

A. Yes, sir.

Q. You had a form of ticket in your hand a moment ago, Mr.
98 Shattuc, which, I believe, gave a reduced rate to parties of four, didn't it?

A. Yes, sir.

Q. It was a Wabash form?

A. I don't know. They were generally used.

Q. There is no reason why, Mr. Shattuc, if the conditions of travel were such—and the inducements to the railroad company of the proper kind, of course—there is no reason why railroad companies should not determine that they would extend a reduced rate to a party of nine or eight or a less number, is there?

A. Well, I never heard that question discussed; I don't know. It

would be simply a question of policy as to whether our attorneys would say it would be right to do it. If we could make money out of it and our attorneys would say that it would not be contrary to the interstate-commerce law we should certainly do it.

Q. You say that if a single passenger pays three cents a mile, two cents is a reasonable rate for a party of ten?

A. Yes; it has proved so to us.

Q. Mr. Shattuc, what, in your opinion, ought a party of five to pay; not according to any rule which you have, but according to the general policy of your road?

A. That would be determined by the numbers that we would have of parties traveling in five. I can not just answer your question. I have not figured that.

Q. You said that before the passage of the interstate-commerce law regular organized parties were accorded a reduced rate?

A. Yes, sir.

Q. What was the name of the ticket given to those parties?

100 A. We had no name on the ticket itself. We had several different kinds of tickets at first, and so as to simplify the matter we consolidated them in one.

Q. But the general rule, the general regulation of the railroad company, so far as you know, was that that rate was accorded to regular organized parties only?

A. The rate was then, as a rule, made for theatrical people and base-ball players, but on the passage of the interstate-commerce law our attorneys told us that in order to take care of that business it would be necessary for us to have it open to the public; because if we did not it would be open to the prohibition of the Interstate-Commerce Commission, and so——

Q. I understand that perfectly, Mr. Shattuc. I was confining you to the time prior to the passage of the interstate-commerce law; your answer applies to what has been since the law; I mean before. You said that before the law was passed this rate was accorded to regular organized parties?

A. Yes; this rate or less.

Q. Now, Mr. Shattuc, the question which I asked you was whether the rate was accorded to other persons than regular organized parties.

A. We had no regularly established rule as to that before the passage of the law, as we have now. In other words, all regular organized parties could get it before without any embarrassment whatever, but it might be some embarrassment for a party of the same number now to get it.

Q. Then there was something like a general rule which accorded to regularly organized parties this rate?

A. I can testify that they got it.

101 Q. And this reduced rate was not, ordinarily, accorded to other than regularly organized parties, was it?

A. Not by such a general rule as it is now.

Q. Mr. Shattuc, is it not within your experience that the business manager of one of those regularly organized companies—speaking now of a time prior to the passage of the interstate-commerce law—would apply to some of the more important officers of the railroad and get from that offi-

cial a card which would entitle him, upon presentation thereof, either to the ticket agent or to the conductor on the train, to avail himself of the regulation in regard to reduced rates of fare for parties?

A. Yes, sir; they would get that card where they were going to stop off at some point; but where they were going from one terminal point to another they simply applied for the passage ticket.

Q. And this ticket or card; what was it called?

A. Well, just a card to suit the fancy of whoever got it up.

Q. Didn't you ever see it called a "theatrical certificate"?

A. Let me see what mine was. (Producing ticket and reading same.) Ours was called "local theatrical certificate."

Q. When was that in force?

A. Up to the time of the (passage) interstate-commerce law.

Q. Have you any objection to producing one of those tickets to be attached to your deposition?

A. Not if you will allow me to attach to it our party rate with it that was in use before the passage of the interstate-commerce law.

Q. Why do you object to letting us have this particular ticket?

102 A. For the same reason that you have a right to ask me; because I have a right to.

Q. And you think you have a right to refer to a paper to aid you in giving your testimony and afterwards decline to attach it to your deposition?

A. Not at all. If my attorney says for me to do so, I will. I thought you asked it as a matter of courtesy, not as a matter of right, and I only asked to be allowed to attach with it, to my deposition, our party rate. I shall be glad to furnish and make a part of my deposition the party, rate ticket I have referred to.

Q. I request you to attach to your deposition a specimen of the "local theatrical certificate" which you have referred to, and which you say you had in force on your road prior to the passage of the interstate-commerce law.

A. I shall decline to do so, except you shall give me permission to attach our party rate also, unless, of course, my attorney says for me to do so.

Q. I insist upon your doing so.

(Upon advice from his attorney witness produces "local theatrical certificate" referred to, which is hereto attached, made a part hereof, and marked for identification "Shattuc Exhibit No. 1.")

Q. From whom, Mr. Shattuc, would a person who wished to avail himself of the reduced rate of fare which this ticket accords get this Exhibit No. 1?

A. Just as he does any other ticket on the railroad; through the general passenger office.

Q. Would he get such a ticket from the ordinary ticket agent at all stations?

103 A. He would have to apply for it there, and it would be sent—forwarded upon requisition. They are not kept there; neither are mileage tickets nor commutation tickets.

Q. Having provided himself with this ticket, this "Shattuc Exhibit No. 1," all of the agents of the road were required by rule to give the reduced rate of fare?

A. A gentleman in possession of this ticket would present it to the conductor, who had authority for transmitting a larger number of people than they had tickets for—than there were tickets to represent them according to this scale here on this card.

Q. As I understand you, Mr. Shattuc, you say that you are now able, by issuing a one-way party-rate ticket, to accomplish the same result precisely as you were able to accomplish by means of that ticket and your then existing regulations?

A. About the same results; I have not figured on the rate there.

Q. Well, the same results, except as to the remuneration or the amount of money which the company would receive?

A. Well, not knowing just what that figures, I cannot answer the question.

Q. These persons are conveyed in the ordinary passenger cars, the same as the public generally, I suppose?

A. Yes, sir.

Q. And the according of this ticket, or of the granting of the party-rate ticket which you now have in force, is direct pecuniary advantage to that class of travelers, isn't it?

A. Not any particular class, because we give it to anybody that wants it.

104 Q. But to this particular class—ten persons in a party—how much of a money advantage is it to them over your regular rates?

A. A little less than one cent a mile, I think.

Q. How did the party-rate tickets compare as to the amount per mile that you charged per mile for the commutation tickets; less or more?

A. I can not answer that question unless you ask me some specified ticket, because, I told you, the rates were different.

Q. I understand you, then, that from some localities you charged a less amount per mile on commutation ticket than you did from other localities?

A. We charged less per mile for a longer run than we did for a short one. I am not absolutely sure, but I think that is true.

Q. And that was true of commutation tickets prior to the passage of the interstate-commerce law?

A. Well, I can't answer as to that. That is simply a question as to what the rates were then, and I can't testify as to that, for I don't know now.

Q. Don't you remember that the rates for commutation tickets were not uniform before the passage of the interstate-commerce law?

A. I think they were not.

Q. Can't you tell how those rates compared; whether they were—whether the average of those rates would be more or less than the party-rate ticket?

A. They would be less, but how much less I can not say.

Q. The party-rate ticket, as I understand it, was a constant rate, as expressed upon the face of the ticket marked "Shattuc Exhibit No. 1," and is now a constant unvarying rate of two cents a mile?

105 A. Yes; two cents a mile where we are the short line between common points; where we are not the short line we use short-line mileage, which would make the rate by our road less than two cents per

mile, but it would be two cents per mile on the shorter line. For instance, between here and Louisville we take one hundred and ten miles, that being the distance by the shortest line.

Q. But it is an unvarying charge to all persons who receive the same kind of tickets on your road?

A. Yes; we don't discriminate between passengers.

Q. And you make a concession when other lines connect with yours, as you said in your answer just now?

A. No, sir; we don't make any concession; we have to do that.

Q. And before the passage of the interstate-commerce law the rates were unvarying and as expressed in this Exhibit No. 2?

A. No, sir; for the simple reason that if a party bought regular tickets to present with this card, those tickets would be sold at a rate on the same basis as our party-rate tickets are made on; we don't discriminate in this ticket as between parties, when before we did; the only difference *is* that now we sell the party-rate ticket to any body who wants it. While this is termed a theatrical ticket, any professional party could get it.

Q. Your conductors on the Ohio and Mississippi Railroad make reports to you of t'e passengers on each train?

A. No, sir; we have a sufficient number of passengers to have a train collector.

Q. Well, some officer on your road makes a report to headquarters of the passengers who travel over your line?

A. No, sir.

106 Q. Don't your conductors, or some of the officers, make a report to headquarters of the number of passengers traveling over your road each trip.

A. He sends in the tickets to the auditor and the cash to the treasurer, and a report of the collection to the auditor, but he don't make any report other than that of the passengers.

Q. He makes no report, then, of the number of passengers?

A. Partially, but not fully. He telegraphs us from a certain station how many passengers he has from a certain point, but he don't make a regular report of the number of passengers on each train traveling over our road.

Q. That is common on roads with which you have been connected, isn't it?

A. Well, where they have plenty of funds to do that, I suppose they do.

Q. Mr. Shattuc, in any road that you have been connected with, have the conductors been in the habit of making a report of the number of passengers on their trains?

A. The Ohio and Mississippi did until within the last few years.

Q. In making up this report the conductor would put the different classes of passengers into one, making one item, would he?

A. Yes, sir.

Q. Would he put the through passengers—would he make up a statement of the through passengers?

A. Yes, sir.

Q. And a statement of the number of local passengers?

A. Yes, sir; a general statement, but not in detail.

Q. Would he make up a statement of the number of commutors?

A. I think not.

107 Q. Did he make up a statement of the persons who traveled on party-rate tickets; one-way party-rate tickets?

A. We have no statement made since we have had party-rate tickets.

Q. I am not speaking particularly of the Ohio and Mississippi Railroad, but of all the roads.

A. That would depend entirely upon what his instructions were.

Q. Do you remember about that?

A. I remember that the general manager wanted the conductors to make up a statement of all the passengers in detail.

Q. In order to make up that statement it would be necessary, if it was made up accurately—it would be necessary for the conductor to qualify the different kinds of passengers, wouldn't it?

A. Yes, sir; certainly.

Q. And he would have to put the commutors into one class?

A. I don't think the commutors' tickets were made out. If you asked him to do that he would have to; but when you asked me whether he did or not, I don't know. I don't believe that there were ever instructions given to make up reports of the commutors' trains; it was simply the through or the local trains. Not commutors' trains.

Re-direct examination by Mr. BOND.

Q. Mr. Shattuc, you have been asked who decided the number that would make a party prior to the passage of the interstate-commerce law, and you said that you did, as a mater of policy——

A. I thought he asked for our own road. I might have said that our president and general manager is the party who decides that.

108 Q. Who decided what should constitute mileage tickets? That is, whether a mileage ticket should be sold for a thousand miles or for five hundred miles or for fifty miles or for ten miles?

A. These things are usually decided by conference with competing lines. Each road would be represented at the conference—at such a meeting as that—by the president of the road or——

Q. Substantially the same people who would decide as to the number that would make up a party?

A. Yes; certainly.

Q. You have testified, I think, Mr. Shattuc, that you issue ten, twenty-five, and fifty-trip tickets?

A. We have for sale——

Q. Before the act, I am referring to. Didn't you so testify?

A. Yes; we had to.

Q. These same persons decided as to what number of trips—what numbers of trips—those tickets should be issued for?

A. Yes, sir; the general passenger agent, under proper instructions, and this general conference with the other roads.

Q. In each case the matter was one of business consideration, was it not?

A. Yes, sir,

Q. As to whether it was proper to make the concession in rate upon the terms of each of these separate tickets?

A. Yes, certainly.

Q. Mr. Shattuc, can you produce the several forms of reduced-rate

tickets that you have described as ten-trip, twenty-five-trip, and fifty-trip tickets, party-rate tickets, issued on the Ohio and Mississippi prior to 1887?

109 A. I can produce the tariff authorizing the sale of those tickets, but as to whether or not I can produce just the tickets themselves that you ask for, I don't know. The old forms of tickets are not now in use and are probably destroyed; but I can produce those just as I have this (Exhibit No. 1), by referring to the sample-book.

Q. Please produce them, then, and attach them to your deposition.

A. Yes, sir; I shall do so.

WILLIAM B. SHATTUC.

Sworn to before me and subscribed in my presence this 9th day of June, A. D. 1890.

HENRY HOOPER,
U. S. Commissioner, S. D. O.

Shattuc Exhibit No. 1.

NOTE.

This certificate does not apply to runs from St. Louis, or East St. Louis to Cincinnati or Jeffersonville, or Louisville, or the reverse, or from Cincinnati to Jeffersonville or Louisville, or the reverse, but locally only.

Companies purchasing to or from St. Louis will have to pay to St. Louis Bridge collector twenty-five cents each for the number of people over and above the number of tickets held. This certificate is not transferable, and must be shown to conductor with passage tickets purchased at regular local rates. Tickets must be purchased from point to point, as conductors will not give stop-over checks. Full fare will be collected if paid on trains.

Baggage-masters will allow 200 lbs. baggage (or properties) free for each person upon presenting this certificate with passage tickets.

OHIO AND MISSISSIPPI RAILWAY.

LOCAL THEATRICAL CERTIFICATE.

Conductors O. & M. Ry. will accept

From _____

First-class local tickets for passage of members of the company *only* as per following schedule:

Until _____ 188 ,

Unless otherwise ordered.

For	4	persons accept	3	tickets.	For	19 persons accept	13 tickets.
"	5	"	3½	"	"	20 "	13½ "
"	6	"	4	"	"	21 "	14 "
"	7	"	5	"	"	22 "	15 "
"	8	"	5½	"	"	23 "	15½ "
"	9	"	6	"	"	24 "	16 "
"	10	"	7	"	"	25 "	17 "
"	11	"	7½	"	"	26 "	17½ "
"	12	"	8	"	"	27 "	18 "
"	13	"	9	"	"	28 "	19 "
"	14	"	9½	"	"	29 "	19½ "
"	15	"	10	"	"	30 "	20 "
"	16	"	11	"	"	31 "	21 "
"	17	"	11½	"	"	32 "	21½ "
"	18	"	12	"	"	33 "	22 "

No. 549.

_____ _____,
General Passenger Agent.

[See other side.]

Adjourned to Friday morning, eleven o'clock, May 30th, 1890.

110 Circuit court of United States, southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Friday, May 30th, 1890. Parties met pursuant to adjournment.

Depositions of Ernest O. McCormick and Orin P. McCarty, taken under agreement on behalf of respondent, waiving notice, and subject to objections for immaterialities and irrevelancies.

Mr. A. G. Safford was present on behalf of the complainant and Edward Colston and Hugh L. Bond, jr., on behalf of the respondent.

Mr. Ernest O. McCormick, being called on behalf of the respondent, and being first duly sworn, testified as follows:

Examination by Mr. COLSTON:

Q. State your name, age, residence, and occupation.

A. E. O. McCormick; gen. passenger and ticket agent of the Cincinnati, Hamilton and Dayton Railroad Co.; Cincinnati, Ohio; age, 32.

Q. How long have you been in the railroad and traffic business?

A. Since 1878–1880.

111 Q. Where, during that time, were you engaged in that business?

A. I was ticket agent of the Louisville, New Albany and Chicago Railroad at Louisville, afterwards in charge of their business in Chicago, then as gen. passenger and ticket agent of their line until June first, last year; then as general ticket agent of the C., H. & D.

Q. State what knowledge you have of what is known as party-rate tickets for transportation over railroads, and how long such tickets have been in use by railroads to your knowledge.

A. The carrying of ten or more people on one ticket, when traveling together on the same train, has been in practice ever since I can remember. Prior to the passage of the interstate commerce law, the majority of these tickets were sold to theatrical people and parties controlled by one man, or whose expenses were paid by one man. The putting of ten or more people on one ticket was originally for the benefit of the railroad company, as it prevented misuse of these tickets, which were sold at a reduced rate.

Q. What misuse do you refer to?

A. I mean that for parties—where single tickets were used intended for the carrying of a party such as I have described, and something happening to prevent that party from taking the trip, the person purchasing those tickets might resell them, and they might be used singly, to the detriment of the regular business. There is nothing further that occurs to me.

Q. You may state whether or not, since the passage of the interstate commerce law, such tickets have been continually in use.

112 A. Yes, sir, by nearly all the roads—on nearly all the roads, I believe, up to the time of the Pennsylvania Company west of Pittsburg ceasing to use them. Some roads have not used them locally, but with very few exceptions all of the roads have used them over their entire length of line, both between competitive points and local points.

Q. I wish you would state what the difference is, as a point of convenience or a point of profit to the railroad company, between the transportation of ten persons by a single ticket for the ten, and ten persons riding on ten single tickets?

A. Do you refer to the solicitation and securing of the business.

Q. I refer to all the circumstances entering into the respective transactions that would make one in any way different from the other.

A. Beginning with the solicitation of the business then, if there were ten, fifteen, or twenty single parties going from this city to Chicago say, our agent would have to solicit those persons singly, which would be done at a much greater cost than if they were in the employ of some theatrical or professional man or business house, where we could deal directly with the party whose business it was to pay for the tickets used by them. The simple matter of the cost of the tickets—the issuing of the tickets—would not enter to a very great extent, although, of course, it is cheaper to issue one ticket than ten. The transportation of parties such as base-ball clubs, theatrical companies, &c., has resulted in a large revenue to the
113 railroad companies, and that revenue would certainly be diminished were we to require these people to pay higher rates. For instance, large theatrical companies would get their ballet in the cities where they proposed showing; large orchestras would fill their number from the players in the cities where they showed or played. As it is now, first-class companies carry their people with them and the railroads get at least two-thirds their full rate from these person's fares, where it would get nothing, or a comparatively small amount, were the principals only to travel. Again, the railroad companies can provide for a stated number of people on their trains very much more cheaply than when they have no advice as to the number of people intending to take the train from one point to another. For instance, nearly all railroad companies pay mileage on sleepers. And must provide extra cars when they expect increased business. When we are handling these parties we know just exactly how many people will require sleepers and can prepare for the same.

Q. And it saves you in many cases from hauling empty cars.

A. It saves us in many cases from hauling empty cars, and when not in hauling cars it saves us from expense in having to cut it out of our train and probably rental of the car not used, in case of an extra Pullman sleeper. It requires an order from the agent in nearly all cases to
114 get them, and if we don't use them we are put to the expense of the mileage of the same and the return of the car.

Q. What convenience is there in this mode of transportation by selling a single ticket for ten persons so far as the manager of a theatrical troupe is concerned.

A. It is quite a good thing for him in a number of ways. It enables him to keep his people together. For instance, if he had some dissatisfied ones wanting to leave his troup before it reached the next city, or who wanted to wait over here and follow, they could do so, or if they had single tickets they could pawn their tickets; or they might cause inconvenience to the manager by missing the train and coming on the next train. Again, it affords protection to the railroad companies, which, in my opinion, is the chief reason.

Q. State whether or not, from your observation and experience, this mode of transporting passengers in parties of ten or more on a single ticket has stimulated or diminished traffic, and whether or not it is a source of revenue to the railroad company?

A. Certainly; it is a great source of revenue to the railroad company, and must have stimulated travel from the fact that better entertainments are afforded, giving more enjoyment to persons living within reasonable distances from the cities where the entertainments are given; thus people will come to an entertainment that is given in good style, where they would not take the trouble to come if it was not well given, or given by a
115 second rate company. You have many instances of this in your own city by the recent engagements of Booth and Barrett, Florence and Jefferson, Henry Dixey, and the Strauss Orchestra that you have with you to-day. Not only are they conducive of excursions on the part of the railroads, but the commuters and persons living on the line of the road spend a great deal of money they would not otherwise spend, in coming into the city to such entertainments.

Q. What would be the effect of the breaking down of this system by abolishing it upon the amount of travel done by the theatrical people themselves?

A. It would have a very great effect. It not only would diminish the number of their troupe, but would cause the formation of stock companies. Large cities would probably be as well served, but the smaller towns would not have the benefit of as good performances, and the railroads would thereby miss considerable travel.

Q. Will you describe what a commutation ticket is and whether or not a ticket for a party of ten on a single ride on the same train is or is not within the category of a commutation ticket?

(Question objected to by Mr. Safford as leading.)

A. A commutation ticket is just the hardest thing to describe any general passenger agent ever attempted to describe. There were many varied definitions of that ticket given at a time when nearly all of the general passenger and tickets agents of the United States were assembled together. Different men have different ideas regarding them. Ours is a liberal view. The company with which I am connected at the present
116 time have a ten-ride ticket on sale that answers the same purpose that a commutation ticket does on many other roads, which ticket is good over our entire line of road, say, from Cincinnati to Toledo, although it is not generally sold, but a party can call for that ticket. We have also what is called a 30-ride ticket, in which case we simply sell the parties three ten-ride tickets. We have also on sale on our road mileage books that could be called commutation tickets really, because it is good for bearer. It can be used between points ten miles apart or 200 miles apart, and is interchangeable with certain other roads. That book would be good from Cincinnati to Chicago, but would be good for the use of only one person at a time. However, it can be used by any member of the family or in his employ. Then we have various tickets for short rides; family tickets of 26 rides at different rates; 54-ride tickets and 60-ride tickets between points like Cincinnati and Glendale or Wyoming, short distances, used mostly by the people living at those places and doing business in the city. There never has been a meeting in the United States

wherein the men who make the rates and form the tickets and have them printed have been able to agree exactly on what was a commutation ticket. At one meeting of the Central Traffic Association Webster's definition was given as the true meaning of the commutation ticket. Answering the part of your question regarding the ticket for a party of ten for a single ride on the same train, would say: We have 10, 20, and 30 ride tickets on sale at our offices, which can be considered as coming under
117 the general head of commutation tickets, or at least they are tickets sold at commutation rates, although not as low a rate as some other commutation tickets.

(Answer objected to by Mr. Safford.)

Q. What is it that suggests or calls for the issue of tickets such as you have described for ten rides, 20 rides, or 30 rides, family tickets, or other tickets of that kind? What is there in the business that suggests or requires that to be done?

A. A very laudable desire on the part of the railroad company to increase its earnings.

Q. Well, in what respect does it tend to increase the earnings?

A. Sold to accommodate the people living along the line of the road, which of course increases the earnings. The same thing causes us to sell these tickets at reduced rates that causes us to give them special trains and facilities and a large number of trains between certain points.

Q. What has been your experience as to whether this practice, since the interstate-commerce act, has or has not led to the abuse of cutting rates or furnishing the scalpers' offices and other like practices of a reprehensible nature?

A. I believe it is generally admitted by nearly all railroad men that the practice is not conducive to aid the scalpers. There have been but few instances brought to light, and they were promptly sat down upon by the lines issuing the tickets. The brokers, to the best of my knowledge, have handled very few of these tickets.

Q. Is or is not a thousand-mile ticket, in your judgment, a commutation ticket?

118 (Question objected to by Mr. Safford, counsel for plaintiff, as being leading.)

A. There is only one form of a thousand-mile ticket that I should think might be termed commutation ticket. It is a ticket good for two or more people or a ticket good for bearer. The ordinary thousand-mile ticket, good for the use of the individual purchasing it, is not a commutation ticket in my judgment.

Q. Is the ordinary commutation ticket good for bearer or to the person whose name is on the ticket?

(Plaintiff's counsel object to question because it is not good evidence.)

A. Our form of commutation ticket is generally made good for bearer. We have one ticket called a family ticket that is good for a man, his wife, or any member of his family or his servants.

Q. State whether or not this ten-ride ticket you speak of is a ticket good for ten separate rides or for ten people going together.

A. Our ten-ride ticket, which is placed on sale by agreement with our competitors—that is, our immediate competitors—is a ticket good for ten single rides by ten different persons or one ride for ten persons going together, or ten rides for the same man.

Q. (By Mr. BOND.) These, I understand you to say, were issued over every part of your road?

A. It can be purchased from any point on our line to any other point on our line under the existing rules, unless there was some special
119 agreement between ourselves and our immediate competitors between those points.

By Mr. BOND:

Q. Was this, or a substantially similar ticket, in use prior to the passage of the interstate-commerce law?

A. Yes, sir; I am quite confident it was on the C., H. & D. Railroad, although I was not with them prior to the passage of the interstate-commerce law.

Cross-examination by Mr. SAFFORD:

Q. Mr. McCormich, how long were you at Louisville as agent of the Louisville, New Albany and Chicago R'y Co.?

A. I haven't the dates exactly, but nearly seven years, I think.

Q. Was it your duty to sell tickets?

A. Yes, sir.

Q. Then in 1882 you went to Chicago?

A. About that time.

Q. And your duties there were the same with reference to the railroad?

A. Yes, sir.

Q. And how long did you remain?

A. I was there as ticket agent for several years, and then as general northern passenger agent.

Q. Several years; 1882 to about what time?

A. Well, about 1886; between 1885 and 1886 as such ticket agent. Then, for a while, as general northern passenger agent in charge of that territory and the ticket office.

Q. Now, up to the time of the passage of the interstate-commerce law your connection with that railroad, or any railroad, was that of an ordinary ticket agent, empowered to sell tickets for the railroad; you
120 had nothing to do, except by way of casual advice, I suppose, in regard to the management of the railroad with which you were connected?

A. Not with the management of the company. I had very great authority in Louisville and in Chicago given me because I was at the terminals—their largest points—and from the fact that I opened these offices or the Louisville offices for ticket business; was the only one with a perfect knowledge of the needs and requirements of that territory.

Q. I am trying to get at what your relation was as to the management of the road.

A. Simply an employe.

Q. I ask you if your situation was such with regard to the company that it was only such advice as you saw fit to give which was given by you to the company?

A. I mean to say that at very many times it was discretionary.

Q. If I understand your testimony, you were, in the conduct of these ticket-offices as ticket-seller and ticket-agent, given rather more extended authority than was given to the ordinary agent?

A. Yes, sir.

Q. Then I don't understand you to say that you had anything to do with the shaping of the policies of this railroad company or its dealing with the public generally?

A. Except at the point where I was located; there I certainly did have.

Q. That I understand. Now, you have stated that these party-rate tickets were used by all roads until the Pennsylvania Company
121 stopped issuing them. Do you wish to say of your own personal knowledge, or to be understood as saying, that all the roads of this country, east and west, north and south, were in the habit of using this class of ticket until the Pennsylvania Company stopped using them?

A. I meant particularly to convey the idea that the handling of parties of ten or more at a time was customary among the different railroads of this country until that time. My reason for mentioning that company was because it was, I believe, the first to cease the use of that ticket.

Q. What do you know, to your own personal knowledge, with regard to the selling of these tickets in the New England States?

A. I know that the parent road, the Pennsylvania Co., did sell these tickets.

Q. I am speaking now of the New England States.

A. Well, they go into the New England States by means of their connections, &c. I know that the majority of lines in the New England States, or a very great number of them, did sell these tickets.

Q. You have said that all the roads sold these tickets. Do you mean to say that you know that all the roads sold these tickets?

A. I mean that to the best of my knowledge and belief the majority of them sold those tickets. I can easily prepare——

Q. State from your own personal knowledge what roads issued
122 these tickets until the Pennsylvania Company stopped their issuance?

A. I don't exactly understand your question. Do you mean to ask me what roads sold these tickets up to the time the Pennsylvania Company, west of Pittsburgh, gave notice they would cease the use of them?

Q. I am quoting from your former testimony, in which you say these tickets were used by all of the railroads until the Pennsylvania Company stopped issuing them. I want to ascertain how much of your testimony as to the practice of all the roads is upon information and belief and wart part has come within your own personal observation and personal knowledge.

A. The Louisville and New Albany issued such ticket; the Milwaukee and St. Paul issued them; the Pennsylvania Co., east of Pittsburgh; the Baltimore and Ohio; the Big Four R. R.; the Cincinnati, Hamilton and Dayton; the L. and N.; the Erie; the Wabash; the Louisville, Evansville & St. Louis Air Line.

Q. You are talking from your personal knowledge?

A. I am talking from the dealings I have had with the railroads. Mr. Safford, I have not probably as yet gotten your meaning. I understood you to ask me what roads were in the habit of using these tickets; I answered to the best of my knowledge that certain roads with which I have

done business have accepted these tickets of our issue and have issued tickets over our road.

Q. What sort of tickets are you talking about?

A. I am talking about party-rate tickets, and that in some of the instances I have named, while our road has not issued over their line,
123 other roads—I have had information from them that they would accept these tickets, which carries with it the fact that they are doing business on that principle.

Q. Then you are to be understood as swearing that from your own personal knowledge you know that these several roads of which you have spoken used these tickets until the Pennsylvania Company stopped?

A. No, sir; I don't want it put that way at all, because some of them are using them at the present time. I do want it thoroughly understood that these railroads were in the habit of accepting the reduced rate on party tickets, to the best of my recollection and knowledge, from the permission we have had to do business over their road at this rate.

Q. Which one of the railroads named by you stopped issuing the party-rate tickets when the Pennsylvania Co. stopped?

A. I don't know that any of them did.

Q. Did you not understand my question to be that you were to give the names of the railroads which stopped issuing the tickets when the Pennsylvania Co. stopped?

A. No, sir; I did not. I understood your question to be——

Q. Then to return to the question which I did ask; what railroad companies do you know, from your own personal knowledge, stopped issuing one-way party-rate tickets when the Pennsylvania Company stopped?

124 A. I don't know to my own personal knowledge that any of the railroads stopped when the Penn'a Co. stopped. I did not understand that as your question.

Q. And still you testified that they were used by all the roads until the Pennsylvania Co.——

A. By a majority of the roads.

Q. You wish to qualify your statement in your direct examination by saying nearly all of the roads instead of all the roads.

A. I did not understand that I gave it "all the roads." I meant to say that the majority of lines with whom I had dealings were in the habit of making these rates.

Q. How many meetings have you attended, such as the one you testified about, in which you say that the railroad companies have been unable to agree as to the meaning of commutation tickets?

A. That meeting of the Central Traffic Association in Chicago is the only one I can particularly recollect now where the question came up as one of the questions principally talked of.

Q. Have you ever known a meeting, other than the one which you mentioned, in which it was endeavored to show or arrive at the meaning of the word commutation?

A. Yes, sir; in conversations with general passenger agents.

Q. I am speaking now of your own personal knowledge of meetings which you attended.

A. I don't mean that either one of the meetings were called to de-

termine what the commutation ticket was. At the time of the
125 meeting to which I refer tickets were discussed and defined, commutation tickets as well as excursion tickets, &c. I am not quite sure whether it was at the meeting at which Judge Cooley was present in Chicago or not, but I believe it was.

Q. Have you ever attended more than one meeting of the kind you have mentioned when it was attempted, where the different railroad representatives attempted, to agree as to the meaning of a commutation ticket?

A. I don't recollect of more than one meeting of that sort at the present time, although I have had many conversations with other general passenger agents on the subject at various meetings.

Q. (By Mr. COLSTON.) And found a diversity of opinion?

A. Yes, sir.

(Plaintiff's counsel objects to the last answer as not responsive to the question.)

Q. When was the first one of these meetings you attended?

A. I can't give you the date.

Q. Before or after the passage of the law?

A. After the passage of the interstate law.

Q. Do you wish, then, to have the statement in your direct testimony to stand, in which you state that there never has been a meeting in the United States where they have been able to agree as to what commutation ticket meant, or a statement substantially to that effect?

A. I meant that I have never attended any meeting where the same idea was given by the gentlemen present as to what commutation ticket might include or embrace.

126 Q. Don't you think you rather overstate the fact when you said that there never had been a meeting of that character in the United States?

A. I don't think I overstate the fact if I say that there never has been a meeting in the United States where the opinion was the same; the majority generally rules, and I never have known of a meeting where the universal opinion was the same as regards these tickets.

Q. You understand, in giving your testimony, I suppose, that you are supposed to testify from your own personal knowledge and not what, as to information, you may have received from others?

A. As I have not attended all of these meetings I could not possibly give from my personal knowledge what took place at all of them.

(Plaintiff's counsel objects to the answer as not responsive.

Question repeated.)

A. I understood that the questions put by Mr. Colston were for the purpose of obtaining what information I had on the subject as in charge of the passenger and ticket department of the road.

Q. Did anybody ever tell you that there never had been a meeting in the United States where they were able to agree as to the meaning of commutation ticket?

A. No, sir; if my answer gave it that broadly it probably ought to be changed, because I meant the meeting at which I was present.

Q. You mean to say, then, instead of there never having been a meeting in the United States, that there was one meeting at which you were
127 present where the persons representing the railroads were unable to agree as to that term?

A. At the meeting I refer to, the opinions were varied as to the meaning of commutation and what should be embraced in commutation or excursion tickets.

Q. You have spoken in regard to a ten-ride ticket from Cincinnati to Toledo, sold by your road, which can be used for ten persons at one time, or one person ten times. How long has that ticket been in use by your road, to your personal knowledge?

A. Since my connection with the road the ticket has been there ready for anyone who might call for it.

Q. Is that ticket publicly advertised and posted in your stations?

A. No, sir; the particular form of ticket I am now speaking of does not appear on the interstate tariff, which tariff bears upon its face a clause that ten or more persons can obtain a ticket at two cents per mile when traveling together on the same train. This tariff has been accepted by the Interstate Commerce Commission. This notice is posted at all of our stations.

Q. Does this advertisement contain the limitation which you say exists as to Indiana or some other States?

A. No, sir; there is no limitation clause in our notices. We will sell a ticket for ten or more people at two cents per mile to any point on our line.

Q. I am asking you now about what you have got printed and
128 posted in the ticket offices for the information of the public.

A. Well, sir, what I would like to state to you is the fact that there would be a different ticket used to Indianapolis or to Chicago, from the tickets used between local points.

Q. Then, if I understand you, you have posted in your office a public advertisement that people can obtain a one-way party-rate ticket when they travel in parties of ten or more, at the rate of two cents per mile.

A. Yes, sir.

Q. And, so far as the public are informed, that rate applies to all stations on your road?

A. Yes, sir.

Q. But they give some sort of instructions to your agents that the permission does not apply to tickets to Indianapolis?

A. No, sir; I do not want to be understood that way at all. We do sell tickets between Cincinnati and Indianapolis, and Cincinnati and all points reached by us, at two cents per mile.

Q. Do you sell the same ticket to parties traveling to that station that you do to parties traveling to other stations?

A. To Indianapolis?

Q. Yes.

A. Yes.

Q. And what do you mean by the limitation which you stated in your examination-in-chief?

A. I meant to explain that we had a ten-ride ticket which the conductor punches out; it is one piece of paper and printed for ten rides, which the conductor punches out. When a man presents that ticket he punches
129 a ride. That is what we call a ten-ride ticket. That can be purchased from any point, say from Cincinnati to any point in Ohio and between other stations on the line of our road where that rate is in

effect, but the other ticket is simply a ticket that is made out, filled in by the agents, "good for ten people" between any points; that the agent will sell from any point to any point, but the limit is not as long on that ticket.

Q. And he will sell it to anyone?

A. To anyone; yes, sir.

Q. Now this ten-ride ticket you have spoken of, is that advertised in your stations?

A. No, sir; there is no reference to that ten-ride ticket, if I remember correctly, on the interstate tariff, because the idea is covered by the other ticket that will be sold for ten or more people.

Q. Are these tickets sold at the same rate per mile as the ten-ride ticket, one way party ticket?

A. In some cases less. In some cases the ten-ride party ticket is sold at less than the rate of two cents per mile.

Q. So then you have a ticket on sale permitting ten rides over your road, which in some instances is less than two cents a mile, or which is not advertised by a printed notice posted in your stations?

A. Yes, sir; that ticket is mostly used in the State of Ohio. We do not sell that ticket for interstate business. That is a ticket that is generally bought by persons desiring to have ten rides.

(Plaintiff's counsel objects to last part of answer as not responsive to the question.)

130 Q. Now, you have testified in your examination-in-chief, that the fact of entertainments stimulate travel toward the place where the entertainment was given, hav'n't you?

A. Yes, sir.

Q. And you have named that as one of the indirect benefits the railroad companies receive by giving one-way party rates to theatrical companies?

A. Yes, sir.

Q. Those considerations were wanting where the one-way party rate ticket was given to other persons who were not engaged in the amusement business, are they not?

A. Yes, sir; they would be.

Q. Now, in attending these entertainments by persons who would use the line of your road, such persons would not use this one-way party rate ticket, would they?

A. Not usually. They could avail themselves of it if ten or more would club together.

Q. I call your attention to one-way party-rate tickets, and a party of ten persons who would go, say from some suburban point to Cincinnati to attend an entertainment, would in all probability use your road to return to their homes, would they not?

A. Yes, sir.

Q. So that in speaking of the persons who travel over your road from some suburban place to attend an entertainment those persons would not use, ordinarily, a one-way party-rate ticket, would they?

A. No, sir; not ordinarily.

131 Q. Now, before the passage of the interstate-commerce law, was it the custom of the railroads with which you have been connected

to issue one-way party-rate tickets to ten or more persons, unless they were engaged in what I have termed the amusement business, which includes operatic companies, theatrical companies, and base-ball clubs?

A. When the case did not warrant an exception they were usually furnished with a reduced rate for so many tickets; some one man generally buying the tickets, or one ticket good for his party, and in some cases, for a car-load.

Q. My question related to the persons who were permitted to avail themselves of this form of ticket before the passage of the interstate-commerce law. Is it true, or not, that the issuing of those tickets was confined, so far as your knowledge extends, to theatrical companies or amusement companies.

A. Generally the issuance of the one ticket good for so many people was confined to those parties; but the rate, when the number warranted, was just as freely given to the people themselves.

A. Did you ever see a ticket which was called a theatrical certificate.

A. Yes, sir; in the form of a letter—a letter from a theater as qualifying a man as a member of the profession.

Q. Were these tickets in use on your road?

A. Theatrical certificates?

Q. Yes.

A. Yes, sir; on the Louisville, New Albany and Chicago road,
132 a theatrical certificate issued by the Chicago and Ohio River Traffic Association was in use.

Q. Did you ever know of any general regulation of the road with which you were connected, which permitted any other parties except theatrical companies and amusement parties to travel upon a one-way party-rate ticket or a reduced rate of fare, speaking of general regulations.

A. No, sir; there was none.

Q. So that since the passage of the interstate-commerce law the style of ticket—the scope of ticket has been very materially changed, has it not?

A. Yes, sir; by advice of our attorneys we were compelled to put on sale a ticket that could be purchased by any one, and advertise it.

Re-exmination by Mr. Colston:

Q. In speaking of the incentive and increase of travel produced by the sale of party-rate tickets for parties of ten and theatrical troupes, and its influence upon the ex'ibitions given by such troupes in drawing travel from suburban places to the cities where the ex'ibitions take place, do you or not intend to be understood as saying that the suburban residents travel to and from the entertainments on the party-rate tickets?

(Plaintiff's counsel/ objects to question as not growing out of the case and as being suggestive.)

A. No, sir.

Q. What rates, ordinarily, would such suburban parties get; a higher or lower rate than a party-rate ticket?

133 (Objection by plaintiff's counsel as leading and suggestive.)

A. They would generally obtain a lower rate.

Q. State what influence, to your knowledge and experience, the party-rate ticket has had upon the general travel outside of amusement companies, if any.

(Plaintiff's counsel objects to question as not growing out of the examination, because the witness was inquired of in regard to this matter.)

A. That party rates made public has enabled parties of ten or more to avail themselves of a lower rate than they could otherwise have obtained. Possibly the numbers of such party have been augmented by the fact that they could obtain that lower rate.

I, Emmet O. McCormick, the witness above-named, have made the above corrections in writing, as I claim that the stenographer failed to catch my meaning, and that the above answers are now correct.

ERNEST O. MCCORMICK.

Sworn to before me and subscribed in my presence this 7th day of June, A. D. 1890.

HENRY HOOPER, [SEAL.]
U. S. Commissioner, S. D. O.

Mr. O. P. MCCARTY, being called on behalf of the respondent, and being duly sworn, testified as follows:

134 Examination by Mr. COLSTON:

Q. State your name, age, residence, and occupation.

A. Orin P. McCarty, age 41, occupation, gen. passenger agent of the Baltimore and Ohio, Southwestern, the Columbus and Cincinnati Midland, and assistant gen. passenger agent of the Baltimore and Ohio.

Q. How long have you been in the railroad passenger-traffic business?

A. Twenty-six years.

Q. You may state about where you have been engaged during that time.

A. First as clerk at Richmond, Indiana, and the Cincinnati, Chicago Air Line offices, and with the Indiana Central Railroad, for several years in Indianapolis as clerk, all in the passenger department; with the I., B. W. from 1870 to 1880, as chief clerk of the passenger department. From 1880 to 1887 with the Union Pacific Railway, in Omaha. The last five or six years of that period I was assistant gen. ticket agent.

Q. Well, how long have you known what are called party-rate tickets for parties of ten to be in use by railroad companies?

A. I can't give the exact date, but the use of party-rate tickets commenced at the time when the method of conducting the theatrical business changed from the old style of stock companies to what is now styled amusement or traveling companies.

Q. Well, about how long have such tickets been in use to the best of your knowledge?

135 A. Well, I have known them to be in use the last fifteen years. How much longer than that I can't say.

Q. Well, were they, prior to the interstate-commerce law, used also by the general public as occasion might require, or was it then confined exclusively to the amusement business?

A. The rates were made ostensibly for amusement companies, although if a party should apply for a rate they would get the benefit of it outside of amusement companies; that is, on the railroads I was connected with—the Indiana and Bloomington and Western and the Union Pacific.

Q. Since the passage of the interstate-commerce law has the practice continued on the part of railroads issuing party-rate tickets to parties of ten?

A. Yes, sir; on the railroads I have been connected with.

Q. I will ask you to state how many commutation tickets are there, and have there been any in use by the railroads during the last four years?

(Complainant's counsel objects to question as leading.)

A. Well, the forms and styles of commutation tickets are so varied, Mr. Colston, it would be a pretty hard matter to answer your question. I can not give you a definite answer.

Q. Well, about how many forms and styles are there, and have there been, during the period mentioned—four or five years past?

A. Well, I should say ten, more or less. That is about as near
136 as I can name. The rules vary on different railroads.

Q. What difference or distinction is there, both as to the ticket and the transportation, between the cases of a one-way party-rate ticket for ten persons and ten tickets for ten individuals between the same points?

A. A ticket calling for the transportation of ten or more persons on one ticket could not be manipulated by brokers or others to the detriment of the company's revenue, while ten individual tickets sold at the same rate for much less than tariff could be used for speculative purposes.

Q. State what differences, if there are any.

A. I don't believe I understand your question.

Q. I refer to the differences in the circumstances of the transportation where that ticket is sold for a party of ten and where ten separate tickets are sold, both being between the same points.

A. If I understand the question correctly, in case of individual tickets they would be sold to regular patrons who would go to the ticket office and call for the tickets individually and separately, and would not go in a body. In the other case the ten people would travel in one solid body, and the special rate which might be given on that ticket would be an inducement for them to organize a party and the party would probably not go but for the special rate.

Q. In regard to the party of ten, would they be required to go at one time or at different times?

137 A. They would have to go on the same train in both directions if they went upon one ticket.

Q. But how is it in the case of individual tickets?

A. The tickets would be if it was a regular local ticket, good on any train until used.

Q. Would or would not a party of ten be required to keep the same car, or might they take different cars on the same train?

A. Not necessarily the same car. They would have to be identified by the party who held the ticket, but the conductor would then give them one of his ordinary train slips, showing that their fare had been paid.

Q. Who does the identifying?

A. The manager of the party, if he can be so called who would hold the ticket.

Q. He points out to the conductor——

A. Yes, sir.

Q. Which were the individuals covered by the ticket?

A. Yes, sir.

Q. In practice state whether that fact leads to parties grouping together in one car as a matter of convenience in the transportation?

A. I think that is true at the commencement of the trip, but the gentlemen of the party might retire to the smoking-car, and the ladies, if any, remain in the coach; some of them might take passage in the sleeper.

Q. State whether or not the rates on your road, or rather on the B. &
O. Road, if these tickets for parties of ten are open, public, and no-
138 torious rates, purchasable by all classes of persons, regardless of
whether they belong to theatrical, amusement, or other branches of business?

A. Yes, sir; it is open to the public and posted according to law, as stated.

Q. You may state whether or not, in your experience and observation as an officer of the Baltimore and Ohio Railroad, the selling of party-rate tickets for parties of ten has affected the business of passenger traffic as to increasing or diminishing it?

A. I don't think there is any question but that the making of party rates has stimulated travel.

Q. Has it stimulated all branches of travel; that is, travel by the general public, or only the amusement travel?

A. I don't think the public generally has taken advantage of the party rate to any great extent, but it has certainly stimulated professional or travel of amusement companies, and by bringing a better class of entertainments, especially to the larger cities, has induced an increase of regular travel into the cities at which these entertainments are given.

Q. Describe fully what is the practice now used by the Baltimore and Ohio Railroad Company relative to selling party-rate tickets for parties of ten one way.

(Complainant's counsel objects to question, because it appears from the
testimony of the witness that the conditions of travel are printed
139 and publicly posted, and the testimony of the witness is not the
best evidence.)

A. A party of ten or more, by applying to any ticket agent on the line, can purchase tickets to any other station on the line at the rate of two cents per capita per mile, short-line mileage being used. The party is given a ticket filled up for the number of people, properly limited, and they then board the train the same as any other passengers and ride to destination, surrendering the ticket to the conductor. If there was more than one conductor, first one cancelled the ticket and left it in the passenger's hands to be presented to and taken up by the last conductor.

Q. Now state what the right or privilege of issuing party rate tickets to parties of ten or more is worth to the Baltimore and Ohio Railroad Company by the increase, if any there be, in its revenue?

A. I can't give you the exact figures, but I should say it would be worth, that we would lose if the party rate was abolished, at least two thousand dollars a month.

Q. Will you kindly describe some of those various kinds of commutation tickets you have heretofore spoken of as being in use at the date when the interstate commerce law was passed.

A. All the different forms of tickets that are used for suburban travel, such as ten rides, 26 rides, 30 rides, monthly, quarterly, annual tickets, so-called school tickets. I would class a mileage ticket as one form
140 of commutation ticket. The party rate ticket is certainly a commutation ticket under the ordinary definition of the term, although a party-rate ticket has not been technically classed in railroad parlance as a commutation ticket.

Q. What is the principle recognized by railroad men by which a thousand-mile ticket is issued at a less rate than the ordinary rate of travel?

A. Before the interstate commerce law was passed mileage tickets were issued only to so-called commercial travelers, and to stimulate that class of travel, to enable the traveler to make frequent trips over the road with his samples and to sell his goods. After the passage of the law the railroads recognized the fact that they could not discriminate, and the mileage tickets were sold openly to the general public.

Q. Well, were those mileage tickets sold to drummers in order to stimulate their travel, sold at a loss or profit to the railroad company?

A. That is a question that has been the subject of discussion among railroad men, and I don't think it has ever been solved to the satisfaction of anybody.

Q. Well, state whether they were supposed to be sold at a profit or loss?

A. The rate was granted in the first place as a concession to the jobbing and manufacturing establishments, and it has always been a question with the passenger men whether we did lose more in the difference in rate
141 on the commercial traveler or rather whether the sale of these mileage tickets compensated the railroads for the loss.

Q. That is, whether the increase of carriage compensated for the diminution in price?

A. Yes, sir; yes, sir; and the loss of travel on account of the merchants at small towns having the goods sold to them at their places of business instead of making frequent trips to the large cities themselves and buying their goods.

Q. This has never been worked out—this problem?

A. No, sir; the mileage ticket has always been considered as being sold for the benefit of the freight department.

Q. And the sale of mileage tickets, instead of being abandoned, has been extended to the general public?

A. No, sir.

Q. You may state whether or not there is any convenience realized by the railroad companies transporting people on these party-rate tickets for parties of ten from the fact of being enabled to judge of about the amount of rolling-stock and number of cars that would be needed on any particular occasion.

A. Yes, sir; a very great convenience with large amusement companies. Of course, if there were only a party of ten we could accommodate them on any of our trains without any additional equipment, except in case of sleeping-cars being required; we would then have to have notice in advance.

142 Q. Well, you may state how it is a convenience; what makes it a convenience?

A. Well, in case of a party—an amusement company of, say fifty people,

or any party of 50 coming to our train or to the depot to take a certain train without any previous notice—it would involve considerable delay in providing an extra coach for their occupation; while, if notice is given in advance, the coach would be provided without any delay.

Q. State whether or not notice is usually given a sufficient time in advance to enable you to provide an additional car, if one be needed.

A. Yes, sir; notice is almost invariably given time enough in advance to provide for any party.

Q. Look at the complaint in this case on behalf of the Interstate Commerce Commission, and state whether or not the transportation which is there made the subject of complaint was sold by the Baltimore and Ohio R. R. Co. at the rates named in the complaint, or on a one-way party ticket?

A. Yes, sir; I presume the people were all transported over the Baltimore and Ohio Railroad, at least it is alleged that they were transported over the Baltimore and Ohio Railroad, but the records of my office, as assistant general passenger agent of that company, are in Columbus, and I have not the data to verify this statement, and the copy I hold in my hand, which was given me a few moments ago, is the first official copy I have received of the complaint. I have no doubt, however, that special rates were made and the people carried, although I would not testify that it is so. I won't say that these rates were made, but that they were carried at less than the regular single-ticket rate.

143 Q. By Mr. BOND. They were carried at rates advertised by you for party rates.

A. If carried by our company; yes, sir.

Q. For parties of ten?

A. Yes.

(It is admitted by defendant that these parties were carried on the regular advertised party rates as testified by this witness.)

Q. What is the difference in rates between the single ticket and the per capita charge for party rate ticket for ten? Say from Columbus to Pittsburg.

A. $2.15.

Q. What is the short line between Columbus and Pittsburg?

A. 193 miles.

Q. What is your line?

A. 211 miles.

Q. If I understand you the rate is made by taking the short line between the point of starting and point of destination, and is calculated on a basis of two cents a mile for the one-way party-rate ticket.

A. Yes, sir.

Q. That is or is not at two cents a mile uniform?

A. As far as I know, yes, sir.

Q. For parties of ten or more?

A. Yes, sir. By uniform I mean, in all cases, on our road, and between all points, and to all patrons.

Cross-examination by Mr. SAFFORD:

Q. As I understand, it is by your line 211 miles from Columbus to Pittsburg, but by some shorter line of road it is 193 miles.

A. Yes, sir.

Q. And you charge parties of ten at the rate of $3.85, because it is customary to drop the fraction, and what do you charge single passengers passing between the same points on your road?

A. Six dollars.

144 Q. Do you have a mileage ticket in force on your road?

A. Yes, sir.

Q. And on a mileage ticket your conductors would punch 211 miles?

A. No, sir; our conductors would punch 193 miles.

Q. You were inquired of by Mr. Calston as to the difference in transportation between parties of ten or more who travel on one ticket and the same number of persons who travel on single tickets so far as the service rendered to the parties are concerned. Is it the same in both classes of persons, the service rendered by the railroad company?

A. Yes, sir.

Q. And what is the average rate per mile charged by your company on local tickets to the public generally?

A. The regular local rate in the territory over which we have jurisdiction, west of Pittsburg, is three cents per mile. Of course that is cut down in some instances by shorter lines cutting across and forming competition. We have to meet their rates.

Q. But your general ordinary local rates on the lines west of Pittsburg is three cents per mile?

A. Yes, sir.

Q. And this regulation rate that you now have in force in regard to parties of ten gives an advantage of, on an average, *of* one cent a mile to the companies on persons who avail themselves of this rate and form these parties, does it not?

A. No, sir; because the majority of these companies travel between competing points, and a very large part of the amusement travel is between Columbus and Pittsburg.

145 Q. But there is some pecuniary advantage to people who avail themselves of this rate I suppose?

A. Certainly it is a reduction on the rate?

Q. And therefore those of your patrons who were unable to form themselves into parties are at a disadvantage, so far as the rate is concerned, as compared with those patrons who are able to form parties of ten or more?

A. They can accomplish the same thing by the purchase of a mileage ticket.

Q. But, as between those persons and those who purchase of you a single ticket over your road, the latter are at a disadvantage, are they not, so far as the rate is concerned?

A. Yes, sir.

Q. So far as the right to carry baggage is concerned do you make a difference between companies traveling together and a single passenger?

A. No, sir.

Q. In every respect the service performed by the company is the same in both cases?

A. Yes, sir; I would state that it is the same except where the company has a car load of baggage. In that case we have a regular rate for transporting a car, but where it is ordinary checked baggage and carried in the ordinary baggage car the excess is charged alike to all.

Q. You have stated that ordinarily notice was given when you had a party to carry?

A. Yes, sir.

Q. Suppose your rules do not require that any such notice be given?

A. No, sir; except that our instructions, that is, the party purchasing the ticket would not be required to give us any notice, but our agent
146 who sells the tickets is required to give notice.

Q. You have spoken of the case of large companies of fifty or more who avail themselves of this method of transportation, and have said that as they usually give you notice you were able to provide equipment more readily, and I suppose that in the absence of such notice your trains might be over-crowded with the multitude of people, and that it is an advantage to the company.

A. That is one of the advantages.

Q. Now in case of a large party of this kind who travel on one-way, party-rate tickets, such parties are usually an addition to the ordinary travel over the road.

A. Yes, sir.

Q. And if you took a party of fifty or more persons, say from Cincinnati to Columbus, ordinarily you would have to add at least one car to your train?

A. Yes, sir.

Q. When you had taken that company to Columbus, ordinarily that company does not return to Cincinnati?

A. An amusement company, no, sir.

Q. This method of transportation would tend to bring about an excess of equipment at the stations where the large company left your road, would it not?

A. Well, we have more or less of this business in each direction, and that car could be brought back with a similar party, or hauled on our regular train for regular business. I think it is customary with railroad com-
147 panies to store a surplus of equipment at different points on the line to accommodate any extra business that might be presented.

Q. I understand that my question was whether that kind of business would tend toward an excess of equipment at the station where the company left your road, and that it would be to the disadvantage of the company in all cases.

A. I should say not.

Q. In your present position do you receive the reports of the conductors of the trains?

A. No, sir.

Q. Can't you tell us what the system of reports is by the conductors on the part of the Baltimore and Ohio Railroad Co.?

A. The conductors make what is called a report of cash collections; that is, cash fares collected on the trains, and those reports are put into an envelope at the end of each trip, together with the tickets collected for that particular trip, and sent to the auditor of revenue at Baltimore.

Q. Do your conductors, as I believe is customary on some roads, accompany their tickets with a written report of the number and different kinds of tickets which they receive?

A. They make a specific report of the mileage tickets collected, but

aside from that I don't think any report is made of the tickets collected. It is a matter entirely outside my department, and I can not say.

Q. Now, you have said that the party-rate ticket, as now in force since the passage of the interstate-commerce law, had stimulated the travel of theatrical companies, as I understand you?

148 A. Yes, sir.

Q. You have stated, I believe, that the public generally did not in point of fact avail themselves to any great extent of this kind of a rate. This I understand has been the effect of this sort of ticket since the passage of the law as compared with the time before the passage of the law.

A. Well, I don't mean to have the statement put on record so. What I mean to say is that it always stimulated travel not only prior to but subsequent to the passage of the interstate-commerce law.

Q. And I understand you to say that this method of doing business originated some 15 or 20 years ago, as you recollect?

A. Yes, sir.

Q. Has this increase of travel been a constant increase from the time these tickets were first put on sale to the present time?

A. My impressions are yes.

Q. Then it is in your experience that the theatrical travel has been constantly increasing for the last 15 or 20 years?

A. Yes, sir.

Q. So far as your experience goes, then, you have not noticed any diminution of the travel of theatrical companies since the passage of the interstate-commerce law?

A. No, sir.

Q. This increase of travel must be due, in your opinion, I suppose, to an increase in the number of companies traveling; so you think that there are more companies traveling to-day than at the time of the passage of the law?

149 A. I think so, yes.

Q. That, I understand you to say, is true in your territory?

A. So far as my experience goes, yes, sir.

Q. You speak of the tickets for parties of ten being given to the parties when they apply for it. Do you mean that is the condition of affairs now, or before the law?

A. Before the law went into effect the party-rate ticket was not used generally or openly at the stations. Application had to be made through the agent to the proper officer of the passenger department; at least that was the custom on the roads I was connected with.

Q. Well, in those days one-way party-rate tickets were not issued by ticket agents generally unless the parties asking for the reduced rates of fare obtained a special permit in each case from some of the more important officers of the road, were they?

A. No, sir.

Q. Since the passage of the law some of the roads at least have advertised and sold a ticket such as mentioned in the complaint in this case, and these tickets have been sold to whoever applied for them and by the ordinary ticket sellers at stations, the only condition being that they should bring themselves within the limited number?

A. Yes, sir.

Q. Before the law were not those reduced rates to parties traveling together permitted to parties of less than ten?

A. Yes, sir.

Q. What was the lowest number of persons traveling together in one party who at that time were permitted to avail themselves of the
150 reduced rate?

A. At one time the Union Pacific Road, between the Missouri River and Colorado, sold these tickets to parties of two or more. That was done specially for the benefit of variety people who traveled in pairs. I have forgotten, however, what the rate was, but it was more than two cents per mile.

Q. So that from time to time in your experience and before the law different companies had different rules, not only as to who traveled on these tickets, but as to the number of persons which should compose a party who were entitled to have the benefit of the reduced fare?

A. As a rule, prior to the interstate law, that matter was regulated by the representatives of the roads centering at the larger cities, who would by agreement between themselves fix certain conditions under which these tickets could be sold.

Q. But those conditions as to the number constituting a party varied at different times and with different roads?

A. Yes, sir.

Re-examination:

Q. (By Mr. BOND.) You have testified that the party rates are based on short-line mileage, as was mileage tickets, or deductions from mileage tickets. That is true of regular tickets, is it not?

A. Yes, sir; the rates were equalized in that way.

Q. Those parties of two, &c., were strictly confined to theatrical people, were they not?

A. Yes.

O. O. MCCARTY.

151 I, Henry Hooper, a commissioner of the circuit court for the southern district of Ohio, do hereby certify that, on the 29th day of May, 1890, and the 30th day of May, 1890, and days mentioned in said depositions, I was attended at the office of the U. S. attorney, at Cincinnati, Ohio, by the counsel aforesaid and the witnesses, Elias A. Ford, William B. Shattuc, Ernest O. McCormick, and Orin P. McCarty, who were of sound minds and lawful age, and the said witnesses were by me carefully cautioned, examined, and sworn to testify the truth, the whole truth, and nothing but the truth; and the depositions were by stipulation between counsel for both parties taken in shorthand by a stenographer and afterwards reduced to writing and from their statements, and that the witnesses, after reading the same, subscribed the same in my presence. I have retained the said depositions for the purpose of sealing up and directing the same to the court for which they were taken.

And I do further certify that I am not of counsel nor attorney for

either of the parties in said depositions and caption named, nor in any way interested in the event of said cause.

In testimony whereof I have hereunto set my hand and seal this 9th day of June, A. D. 1890.

[SEAL.]

HENRY HOOPER,
U. S. Commissioner, S. D. of Ohio.

U. S. court's costs.

E. A. Ford's testimony for complainant, 70 fol., at 20			$14.00
W. B. Shattuc, " respondent,			
E. C. McCormick, " "	198 fol		39.60
O. P. McCarty, " "			
			$53.60

June 18, '90, $39.60 paid by Baltimore & Ohio R. R.

HENRY HOOPER,
U. S. Commissioner.

152 And afterwards, to wit, on the 21st day of June, A. D. 1890, there was filed in the clerk's office of the court aforesaid, by the attorney for the defendant in above-mentioned cause, the following depositions, clothed in the words and figures as follows:

In the circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD Company.

Testimony on behalf of defendant, taken pursuant to agreement before John A. Shields, esq., United States commissioner, at 346 Broadway, New York City, Tuesday, May 27, 1890, at 11 a. m.

Appearances: Messrs. A. G. Safford and A. H. Vanderpoel for complainant, H. L. Boud, jr., esqr., for defendant.

It is hereby consented *that* counsel for the respective parties that the testimony of the witnesses may be taken down by a stenographer with the same force and effect as if taken down by the commissioner in his own handwriting.

153 This testimony, on behalf of the defendant, is taken by agreement, the petitioner waiving the notice required by the statute.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner duly appointed by the circuit court of the United States for the

southern district of New York, in the second circuit, under and by virtue of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at the office of the Trunk Line Association, No. 346 Broadway, in the city of New York, in the said southern district of New York, in the State aforesaid, Frank W. Sanger, to testify and the truth to say on the part and behalf of the defendant in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is the complainant and the Baltimore and Ohio Railroad Company is the defendant.

And the said Frank W. Sanger being of lawful age and having been by me first cautioned and sworn to testify to the truth, the whole truth,
154 and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Frank W. Sanger, and he did thereupon depose, testify, and say as follows, viz:

By Mr. BOND:

Q. 1. State your name, residence, and occupation, Mr. Sanger.

A. Frank W. Sanger; residence, corner of 41st and Broadway, hotel Vendome; occupation, theatrical manager.

Q. 2. Won't you state briefly your experience in that profession?

A. I have been an active manager for twenty years and actively managing for ten years.

Q. 3. What company or companies have you now?

A. At this minute my companies are all closed.

Q. 4. Well, during the past season, of course?

A. During the past season the Bunch of Keys Company, Mr. Barnes of New York Company, and Mr. Potter of Texas Company; that is all.

Q. 5. From your knowledge of the business can you state approximately the number of traveling amusement and theatrical companies during the past season?

(Objected to.)

A. Only as stated in the principle journals of the dramatic profession, such as the New York Clipper and Mirror and News, which have stated that there was so many companies started on a tour this season—I think the statement was 340 at the beginning of the season.

(Objected to.)

Q. 6. What would be the average size of the company?

155 A. 15 to 18 people; 15 or 16 people; I am speaking of dramatic companies.

Q. 7. You do not include the operatic companies?

(Objected to.)

A. No; or burlesques.

Q. 8. What would, in your opinion, be the average expense for traveling for railroad fares per company through the season?

(Objected to.)

A. A company of the size that I mention, under the present interstate law, about $140 or $150 a week.

Q. 9. For a season of how many weeks?

(Objected to.)

A. As long as they travel—40 weeks.

Q. 10. What was the amount of this business, Mr. Sauger, in 1887, prior to the passage of the interstate-commerce law?

(Objected to.)

A. I have no means of knowing the exact figures, but it was much larger than it is now. I know so many companies have been abandoned like my own; I gave up touring my large companies entirely; I toured one company the year the interstate law passed—the Harbor Lights Company, which had 33 people—and that was quite sufficient; I stopped and I have never toured a company since until this year, and then they have all been small organszations.

Q. 11. What, in your opinion, would be the effect on the present business of the withdrawal in the territory where it is now in force of
156 the two-cent party rate; would it or would it not further diminish the number of the traveling companies?

(Objected to.)

A. It would diminish the number of traveling companies very much if instead of the two-cent rate the rates were made higher.

Q. 12. Then, I understand you to say that, in your opinion, the continuance of the two cent rate is necessary to the existence of a large number of the present traveling companies?

(Objected to.)

A. Undoubtedly; and is absolutely essential to the large organizations; they can not live without it. I can add to that that I think it is a matter of record since the interstate commerce law came in that there is not a manager of a large opera company that has made any money, I think, with the exception of one, and he did very little traveling and played in no less than three cities. I refer to Mr. Wilson, who played in Boston, Chicago, and Philadelphia a twelve or fourteen weeks engagement.

Cross-examined by Mr. SAFFORD:

X Q. 13. Do you mean to testify, Mr. Sauger, that the difference between the reduced rates to parties and the higher rate which you mentioned represents the profit which these traveling companies make as a general thing?

A. It represents a fair margin of profit illustrated in this way, that if your riding rates average $100 a week and by the excess rates of
157 baggage and passenger tickets it costs you $150, that $50 in forty weeks represent $2,000, a fair season's profit we will say of $6,000, and it is a third of your profits.

X Q. 14. Well, you have testified that as to some of these companies their existence depended upon this reduced party rate, and that it was absolutely essential to them and that they couldn't live without it; is that right?

A. I didn't say to some of these companies. I said to the large organizations.

X Q. 15. I said to some of them, and I presume from that statement that it is your opinion that, with the reduced rate, those companies of which you have spoken could live and could make a fair profit?

A. Yes.

X Q. 16. So, then, if I understand you, it is what these particular companies make out of the reduced rates which represents their profit?

A. At least a portion of them; the major portion of them in that case.

X Q. 17. So that, practically, as to these companies, the railroad, you think, ought to contribute the profit which these companies ought to make?

A. I can't say that; it is either a question of stopping the business or dividing the profit.

X Q. 18. Now, as to the State of New York, as to the number of lines of railroad communication, by law the rate is fixed at two cents per mile, is it not?

A. Yes, sir.

X Q. 19. The theatrical rate is not less than that, is it?

A. No, sir.

158 X Q. 20. You have said that before the law you had a number of different amusement companies on the road?

A. Yes, sir.

X Q. 21. And that after the law was passed you stopped?

A. Abandoned my large companies.

X Q. 22. Why?

A. Because I considered that the excess in railroad and baggage transportation would make a margin of profit too small for me to continue on with them.

X Q. 23. Then you found that most of the railroads were taking the position that under the law they were not permitted to accord this party-rate ticket, did you not?

A. I didn't go into the law; I simply contracted what the rates would be to certain points, and, finding they were so much more than they had been before, I couldn't afford to do it after one year's experience.

X Q. 23. Repeated.

The WITNESS. I don't know about the railroad's business; I know I go to them and they say "our rates or so and so."

X Q. 24. You have testified that you stopped this business upon the the passage of the law?

A. Oh, no; I beg your pardon if I did; I made an error; I said that I had a company that played through that season at the time the law came into effect, and that the rates were so excessive from railroad fares or were so heavy that I stopped then and abandoned my large companies.

X Q. 25. You found that the rates of the railroads that you did patronize were increased after the passage of the law?

A. Yes, sir.

159 X Q. 26. And you were unable, I suppose, to overcome the prejudice of the railroads as opposed to your position?

A. I didn't attempt to.

X Q. 27. I understand you to say that you applied to the railroad companies and you found that the rates were increased after the passage of the law?

A. Yes, sir.

X Q. 28. And you have assumed in your testimony that it was in consequence of the passage of the law?

A. Yes.

X Q. 29. So that the railroad companies, as a general thing, so far as

you applied to them, interpreted the law so as to require them to increase the rate as to amusement companies, did they not?

A. I presume the' did; yes.

X Q. 30. In those days, before the passage of the law, there were a great many companies organized in the different cities which went out upon the road, were there not, and a great many of them broke down for other reasons than on account of the expense of transportation, I suppose?

A. I suppose the same misfortunes came in business then that do at any other time.

X Q. 31. Well, it is true that a great many of these companies which are organized in the cities and travel about from place to place break down on the road, don't they?

A. Yes, there are some.

X Q. 32. Quite a proportion of them, is there not?

A. No; I don't think a large proportion.

X Q. 33. I am not speaking of course of your companies, but of other people's companies?

160 A. Oh, there are some companies, you know, that go to the wall.

By Mr. VANDERPOEL:

Q. 34. Mr. Sanger, since the passage of this act there have been a greater number of these companies that have broken down on the road?

'. Oh, yes; in fact it has increased to such an extent that at one time there was a record kept of it by various journals.

FRANK W. SANGER.

Signed sworn to before me this 19 day of June, 1890.

JAMES A. SHIELDS,
U. S. Commissioner, Southern District of New York.

UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered, that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at the office of the Trunk Line Association, No. 346 Broadway, in the city of New York, in the said southern district

161 of New York, in the State aforesaid, Joseph Arthur, to testify and the truth to say, on the part and behalf of the defendant in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is the complainant and the Baltimore and Ohio Railroad Company is the defendant.

And the said Joseph Arthur, being about the age of forty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Joseph Arthur, and he did thereupon depose, testify, and say as follows, viz:

By Mr. BOND:

Q. 1. State your name, age, and occupation.

(Objected to.)

A. Joseph Arthur; my age is 40 year'; I am a dramatic arthor and manager.

Q. 2. Won't you state your experience?

(Objected to.)

A. I have had a pretty comprehensive experience since the success of my play, the Still Alarm. I have been the actual manager of it, and acting manager, and traveled with the company abroad and three seasons in this country, and have made all the railway contracts; that is, most of them.

By Mr. VANDERPOEL:

162 Q. 3. You have been running that play for about how long?

(Objected to.)

A. This is the finish of the third season; we close Saturday night.

By Mr. BOND:

Q. 4. Mr. Arthur, how many traveling dramatic companies were there on the road last season; and how many were there, say, in the season of 1886 and 1887?

(Objected to.)

A. I haven't even an approximate idea of the number. You mean before the passage of the law?

Q. 5. Yes.

(Objected to.)

A. Speaking generally, from a general knowledge, I should say that they were largely in excess in number in 1886 and 1887, as compared with the past seasons.

Q. 6. How many were there during the past season?

(Objected to.)

A. Well, Mr. Sanger quoted the figure as given by the dramatic records, which he described to you. I think there were about 350; I can only state it approximately.

(Objected to.)

Q. 7. Just answer the question directly, if you will. From your knowledge of the business, you think there were 350 companies?

(Objected to.)

A. I think so.

163 Q. 8. What would be the average number in those dramatic companies?

(Objected to.)

A. Well, I would place it higher than Mr. Sanger; I should say an average of eighteen people.

Q. 9. He omitted from his calculation operatic and burlesque companies; do you include those?

(Objected to.)

A. No, I think not; I don't think I would include them. I am speaking from the statement in the dramatic papers; they compile these things pretty closely, and have the record of every company; I don't

remember whether that list included burlesque or operatic companies; I don't think it did.

Q. 10. You also meet these companies on the road, do you not, and have an opportunity of judging their numbers?

(Objected to.)

A. Yes, sir, in actual contact; I ride frequently on railway trains with one, two, or three companies on the same train.

Q. 11. And from all the knowledge you have, you would say that the average would be about eighteen, omitting operatic and large burlesque companies?

(Objected to.)

A. Yes, sir, I think that is a very modest average; there are 23 people in my company, and I have only got ten acting people in the cast; we have got to carry excess with us, but still they are members of the organization and necessary thereto.

Q. 12. From your knowledge and experience, what would be
164 the average amount of railroad fare paid by each of these companies per season?

(Objected to.)

A. I should say between $4,500 to $5,000.

Q. 13. What, in your opinion, Mr. Arthur, would be the effect of an increase in the passenger fares paid by such companies over that which they have to pay to-day?

(Objected to.)

A. I should think it would limit the number of companies traveling.

Q. 14. Was that the effect of the withdrawal of the two-cent rate in the trunk-line territory after the passage of the interstate commerce-law?

(Objected to.)

A. Yes, sir.

Q. 15. And you think that the withdrawal of that rate in the territory where it is now enforced would further limit the number of companies?

(Objected to.)

A. I think it would.

Cross-examined by Mr. SAFFORD:

X Q. 16. Did you have any experience in the managing of traveling companies before the passage of the law of April, 1887?

A. Not as a manager; as a business-manager and agent.

X Q. 17. You had had some experience?

A. Yes, but my managerial experience was confined to the Still Alarm, my own company. I had never been the manager of any other enterprise.

X Q. 18. I believe the Still Alarm Company didn't take you out of New York until after the passage of the law, which was in April, 1887, did it?

A. Yes, sir; it was after.

165 X Q. 19. It was after, and not before?

A. Yes, sir; but I had had experience with the Bunch of Keys Company, and had made railway contracts for Mr. Sanger, and I noted the vast difference.

X Q. 20. Now, in this Still Alarm Company you have to take quite an

amount of excess; you have to carry around your horses and quite a quantity of stage material?

A. We do, but not so much as a great many others; we carry one car-load, and some carry two and some three.

X Q. 21. Do the companies presently make you any concessions as to the carriage of your horses and other stage excesses; do they do that at this present time?

A. I have never understood that any railroad arrangement since the passage of the bill was a concession. I never asked or expected it.

X Q. 22. How was that before the passage of the law as to the properties which you carried?

There were concessions; there was general competition.

JOSEPH ARTHUR.

Sworn to before me June 12, 1890.

JOHN A. SHIELDS,
U. S. Commissioner, Southern District of New York.

UNITED STATES OF AMERICA: SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss.:

166 Be it remembered, that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the Revised Statutes of the United States, did call and cause to be and personally appear before me, at the office of the Trunk Line Association, No. 346 Broadway, in the city of New York, in the said southern district of New York, in the State aforesaid, James C. Duff, to testify, and the truth to say, on the part and behalf of the defendant in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States, for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is the complainant and the Baltimore and Ohio Railroad Company is the defendant.

And the said James C. Duff, being about the age of thirty-five years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said James C. Duff, and he did thereupon depose, testify, and say as follows, viz:

By Mr. BOND:

Q. 1. What is your age, residence, and occupation?

A. Age, 35; residence, 33 West 10th street; occupation, theatrical and operatic manager.

Q. 2. What experience, Mr. Duff, have you had in traveling with operatic and dramatic companies?

(Objected to.)

167 A. An experience of ten or twelve years with various companies principally operatic.

Q. 3. Prior to the spring of 1887, did you and did all other theatrical companies, so far as you know, receive rates from the railroad companies lower than the regular individual rate?

(Objected to.)

A. They did.

Q. 4. What was the history of the growth of these traveling companies?

(Objected to.)

A. As to the exact date when the combination system began, I am not entirely conversant with it. I imagine it must go back 18 or 20 years, but from that point it began to grow until the stock company was almost entirely out of the question. In the country outside of New York I believe there is only one stock company in existance that I know of.

Q. 5. That was true in 1887?

(Objected to.)

A. No; that was not true in 1887. Yes; that was true as to the stock company and the extent of the combination system.

Q. 6. So that during the period of, say, fifteen years, from 1872 to 1887, this traveling amusement business has grown and developed?

(Objected to.)

A. Yes, sir.

Q. 7. And during that period of its growth, it received reduced rates from the railroads, did it?

(Objected to.)

A. So far as I know, in every instance.

168 Q. 8. Could you give an idea of what those rates averaged?

(Objected to.)

A. Well, I should say never higher than two cents and from that down in proportion to the size of the company and the number I think it was influenced. A company of ten or twelve, for instance, would not receive the same rates as a company of fifty or sixty. It was influenced in proportion.

Q. 9. Is it or is it not a fact that to-day the larger companies running up in the neighborhood of one hundred have come to use special trains?

(Objected to.)

A. In most instances.

Q. 10. Can you, Mr. Duff, from your knowledge of the business and observation, state approximately the number of these traveling companies in the season of 1886 and 1887?

(Objected to.)

A. No, I couldn't tell that even approximately beyond the figures you already have on that subject. I have read, as others have, accounts in the dramatic papers what number is now in existance, and I should say certainly that the number was greater in 1886 and 1887 than it is now, from the fact that so many companies have come in.

Q. 11. What would, in your opinion, be the average number in each company to-day?

(Objected to.)

A. Well, what kind of a company?

169 Q. 12. Take dramaic companies.

A. Oh, I should think the dramatic companies would average from eighteen to twenty, and operatic companies would average from fifty to one hundred.

By Mr. VANDERPOEL:

Q. 13. Burlesque?

Q. Large burlesque companies about the same, 50 or 60.

By Mr. BOND:

Q. 14. The dramatic season is how long?

(Objected to.)

A. Usually recognized as forty weeks.

Q. 15. At what figure would you place the amount of railroad fares paid by the average company during the season?

(Objected to.)

A. Well, of course it depends upon what class of company it is. A dramatic I should think would expend $4,000 to $5,000 in a season; an operatic would expend all the way from $10,000 to $15,000 easily.

Q. 16. The operatic company would not stop at as many places, I suppose, as the dramatic company?

(Objected to.)

A. No; it would make fewer jumps.

Q. 17. What, in your opinion, would be the effect of the withdrawal of the two cent rate in the territory where it is now in force and the substitution for it of a higher rate, say three cents.

(Objected to.)

A. Oh, I should say it would have the effect in many instances of disbanding enterprises, and among others in the case of large companies
170 they would confine their engagements to three or four cities, and extend the length of their stays.

Q. 18. You think that it would be a necessity of the business to reduce the amount of travel by the company?

(Objected to.)

A. Well, I found it personally so.

Q. 19. You have had an experience of that sort, Mr. Duff?

(Objected to.)

A. I have.

Q. 20. When?

(Objected to.)

A. At the termination of this season I arrived at the conclusion in connection with railroad fares and my companies.

Q. 21. How many companies, Mr. Duff, have you had during the past season?

(Objected to.)

A. Three companies.

By Mr. VANDERPOEL:

Q. 22. How many have you now?

(Objected to.)

A. I have one now; the season is virtually over for the other two.

Cross-examined by Mr. SAFFORD:

X Q. 23. You have said that there were more companies in 1886 and 1887 than now. Do you attribute the decrease in number either directly or indirectly to the existence of the interstate commerce law?

A. I attribute it directly to that cause.

X Q. 24. You find that the railroads as a general thing place
170 such an interpretation upon the law, right or wrong, as to demand

an increase of fare over the amount which they charged prior to the law, do you not?

A. That is what I have found.

Circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, do hereby certify that on the 27th day of May, 1890, at No. 346 Broadway, in the city of New York, I was attended by A. G. Safford, esq'r, and A. H. Vanderpoel, esq'r, counsel on behalf of the complainant, and by H. L. Bond, jr., esq'r, counsel on behalf of defendant, and by the witnesses Frank W. Sanger, Joseph Arthur, and James C. Duff; that the said witnesses gave their testimony in the above-entitled cause, which, by consent of counsel for the respective parties, was taken down by a stenographer appointed by me for that purpose; that after the
171 stenographic notes of the testimony of the witnesses had been reduced to writing on a type-writer, it was read over by the witnesses Frank W. Sanger and Joseph Arthur, and they severally subscribed and swore to the same in my presence.

I further certify that the reason for taking the foregoing depositions is that the witnesses are material and necessary in the cause in the caption of the said deposition named, and that they live at a greater distance than one hundred miles from the place of trial of the said cause.

I further testify that said testimony was taken before me by consent of counsel of the respective parties. I have retained the said depositions in my possession for the purpose of mailing the same to the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this twentieth day of June, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] JOHN A. SHIELDS,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

172 And afterwards, to wit, on the twenty-third day of June, A. D. 1890, there was filed in the clerk's office of the court afore-men-

tioned, by the attorney for the complainant, the depositions of Leslie P. Farmer, George H. Daniels, George R. Blanchard, and Lucius Tutle, clothed in the words and figures as follows:

173, 174 In the circuit court of the United States, for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD Company.

Testimony on behalf of complainant, taken pursuant to the annexed notice, before John A. Shields, esq'r, United States commissioner, at New York City, Monday, May 26, 1890, at 10 a. m.

Appearances: A. G. Safford, esq'r, for complainant; H. L. Bond, jr., esq'r, for defendant.

It is hereby consented between counsel for the respective parties that the testimony of the witnesses may be taken down by a stenographer with the same force and effect as if taken down by the commissioner in his own handwriting.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County and State of New York, ss:

175 Be it remembered, that on this 26th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner duly appointed by the circuit court of the United States for the southern district of New York in the second circuit, under and by virtue of the Revised Statutes of the United States, did call and cause to be and personally appear before me at the office of the New York, Lake Erie and Western Railroad Company, No. 21 Cortlandt street, in the city of New York, in the said southern district of New York, in the State aforesaid, Leslie P. Farmer, to testify and the truth to say on the part and behalf of the complainant in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is the complainant, and the Baltimore and Ohio Railroad Company is the defendant.

And the said Leslie P. Farmer, being about the age of forty-one years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Leslie P. Farmer, and he did thereupon depose, testify, and say as follows, viz:

By Mr. SAFFORD:

Q. 1. What is your occupation?

A. A general passenger agent of the New York, Lake Erie and Western Railroad Company.

Q. 2. How long have you been engaged in the railroad business?

A. Twenty-seven years.

Q. 3. State briefly your experience?

176 A. I commenced as clerk in the treasurer's office of the Bellefontaine Railroad Company, and was transferred to St. Louis by the same interest with the Indianapolis and St. Louis Railroad Company as chief clerk of the passenger department in 1868; I was connected with the passenger department of the Pennsylvania Railroad Company from 1872 until 1887, and since that time I have been in my present position.

Q. 4. Prior to April, 1887, at the time of the passage of the interstate commerce law, in your opinion, would the word commutation, as applied to railroad tickets, include what are now known as party-rate tickets?

A. No, sir; I should say not.

Q. 5. Let me call your attention to your letter of the 14th of February, 1890, to Mr. McCain, auditor of the Interstate Commerce Commission, and please to state whether that letter shows your present understanding of the difference between what are now called party-rate tickets and commutation tickets? That letter is as follows: "Replying to the inquiry contained in your favor of the 11th inst., I beg to say that party-rate tickets are a distinct form of transportation not connected in any way with commutation tickets, the former being for one trip between certain specified points and the latter for daily travel."

(Objected to.)

A. My answer would be the same, except that I should insert that party-rate tickets are classed as a distinct form of transportation. I wouldn't like to say that to-day I would consider such a ticket the same,

177 but in reply to this inquiry you wanted to know whether, prior to April, 1887, the party-rate tickets were embraced under the general term of commutation tickets, and to that my answer would be that I should say not, and I think this letter would cover my answer to it with that one exception, that instead of saying that they are, I would like to put it in that they are not classed as commutation.

Q. 6. Then, as I understand your present answer, it is that your reply to Mr. McCain of the 14th of February was directed to an inquiry as to how the word was understood prior to April, 1887?

A. Yes, sir.

Q. 7. And understanding the question in that way you do not care to vary your reply to his letter?

A. No, sir.

Cross-examined by Mr. BOND:

X Q. 8. Mr. Farmer, referring again to the period prior and up to the passage of the interstate commerce law, there were a number of forms of lower-rate tickets, were there not; for instance, mileage tickets, trip tickets good for so many trips, monthly tickets, or other time tickets, and various forms of each of the last two, and in addition there were what were known as excursion tickets; that is the fact, is it not?

A. Yes, sir.

X Q. 9. These tickets were sold at a rate lower than the regular single-fare rate, were they not?

A. Yes.

X Q. 10. Was not the business principle on which that lower rate was made the principle of giving a lower rate per trip in proportion to the amount of traasportation contracted for?

A. I think it was.

178 Q. And when you assent to that question that assent is true of all the roads that you have represented; it was universally true, was it not, so far as you know?

A. So far as I know; yes, sir.

X Q. 12. Among the trip tickets were there not tickets good for ten, twenty-five, fifty, or other numbers of passengers?

A. Yes; I think such tickets were generally in use.

X Q. 13. Bywhom could those tickets be used—I mean those that were publicly advertised?

A. By the general public; under the conditions of each individual ticket.

X Q. 14. Those conditions were various, were they not; some confined to the individual name, some to a firm, some to a family, some to an individual or firm or their employés?

A. They were.

X Q. 15. Where they were issued good for use by more than one individual they could be used by any number or all of the individuals included within the conditions at once, could they not?

A. They could and they could not; so far as firms were concerned, they could not be used except by an individual member of that firm at one time; in the case of families they could be used by any member or all the members of the family at one time. Employés' tickets would be the same as family tickets. The family tickets are, strictly speaking, good for the families only.

X Q. 16. Were there or were there not publicly on sale on the roads that you represented tickets good in the hands of any one for ten, twenty-five, or other number of rides, which could be used by one person,

179 ten, twenty-five, or other number of times, or by ten, twenty-five, or other number of persons at one time?

A. I do not recollect any such instance, except that between Philadelphia and New York I think there was such a ticket. That was a fifty-trip ticket, and it was practically good for the holder without regard to the number of persons traveling on it.

X Q. 17. Mr. Farmer, these ten, twenty-five, or fifty trip tickets were good for the number of trips named at any time within time limits fixed in the ticket, were they not—for instance, one, three, or six months, or more?

A. Yes, sir.

X Q. 18. Those tickets come within your understanding of the meaning of the term commutation ticket prior to 1887, do they not?

A. No, sir; I shouldn't say that they were generally classed as commutation.

X Q. 19. Were they not issued for suburban travel and wherever travel was frequent, and were they not advertised on the same not ces on which other suburban tickets were advertised?

A. I think not upon the roads with which I have been connected.

X Q. 20. Can you produce any of the notices or advertisements of the suburban tickets issued by your road prior to April, 1887?

A. Yes, sir.

X Q. 21. Will you not describe, as specifically as you can, the tickets in use on the roads which you represented, which you consider commutation tickets?

A. I should call a ticket issued for a month for an individual a commutation ticket, or one issued for a scholar for a specified period a commutation ticket; this might also cover tickets issued for more than one month
180 for any period up to and including one year; and on the Pennsylvania Railroad I know that there was a ticket called a family ticket which I should class as commutation; that was a ticket good for a specified number of rides within a certain period for any member of a family.

X Q. 22. The family include what?

A. It generally included the dependent members of the family or a servant therein.

X Q. 23. Mr. Farmer, prior to the interstate commerce law, how did the roads with which you have been connected transport theatrical companies; did they give them reduced rate, and, if so, on what kind of a ticket were they carried?

A. They were generally given a reduced rate, and carried in numbers of ten or more upon one ticket, usually not less than ten persons; I have known exceptions, however, if a regularly organized theatrical company had but seven or eight members they would usually extend the privilege to them.

X Q. 24. Those tickets were not on any regular printed form, were they, in full, but were made up at the discretion of the passenger agents upon blanks or skeleton forms?

A. Yes, sir.

X Q. 25. So that there was then no regular printed advertised ticket, like the so-called party rate ticket of to-day, was there?

A. No, sir; I think such a class of tickets arose after the passage of the interstate commerce law.

X Q. 26. Then so far as recognized classes of reduced rate tickets are concerned at the time of the passage of the interstate commerce law
181 there were the mileage, the excursion, and what you call commutation tickets; is that your understanding?

A. Yes, sir.

X Q. 27. You have testified, however, that there were in use tickets good for ten, twenty-five, fifty and other numbers of trips, but your understanding is that they do not fall within any of the recognized classes, but would be classified as unclassified prior to the passage of the law?

A. Yes.

X Q. 28. Mr. Farmer, the business of traveling companies, amusement and others, has grown to be large in volume and value, has it not?

(Objected to as not growing out of the direct examination.)

A. Yes, it would probably cover several hundred passengers per month on our system of roads; our system of roads runs to Cincinnati.

X Q. 29. Referring now to the present style of party rate ticket, one ticket good for the whole party, in your opinion as a passenger traffic manager is such a ticket open to misuse and abuse in the hands of ticket brokers or speculators?

(Objected to.)

A. I think not.

X Q. 30. As compared with mileage and excursion tickets, which is the more open to such misuse?

(Objected to.)

A. I should say both the latter forms.

X Q. 31. How is it with the mileage tickets issued in the territory with which you are familiar; can they be used by more than one person?

A. I think they could under some circumstances.

X Q. 32. Do you know as a fact whether the printed conditions on some of the roads which are competitors of yours and your territory, permit the use of mileage tickets by bearer?

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A. I do.

X Q. 33. [illegible]nd by more than one person at a time?

A. I think the Lehigh Valley ticket reads "for bearer," and also the Delaware and Hudson Company's ticket. The Reading and the Central Railroad Company of New Jersey, and the Pennsylvania Railroad on certain portions of its line—on the Schuylkill division—and the Erie road in the State of New York.

Redirect by Mr. SAFFORD:

R. D. Q. 34. Just one or two questions, Mr. Farmer, but confining your testimony to the history of this subject before the passage of the interstate-commerce law, and to the roads with which you have been connected, you have testified that there was a class of tickets called mileage tickets. Describe that mileage ticket.

A. A thousand-mile ticket was made up of coupons or punched numbers representing one thousand miles of traffic, attached to a contract which was made good for an individual and members of his or her family or to a firm, but in the latter case, only good for one member of such firm; the ticket was generally limited to one year from date of issue; as to the Pennsylvania road they were good only for one person.

R. D. Q. 37. As to these mileage tickets good for the bearer, what do you know in regard to their use at that time?

A. I believe they were in use on some of the roads, principally in New England, but I think they were in use also upon the roads in Pennsylvania that I have named above, with the exception of the Pennsylvania Railroad.

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R. D. Q. 38. Now, you have spoken of trip tickets, good for so many trips, and monthly trips, various forms of each. How were those tickets classified?

A. As commutation, individual or commutation family tickets.

R. D. Q. 39. As to both these classes of tickets, in which direction or directions would the holder be entitled to transportation?

A. In either direction.

R. D. Q. 40. If a party desired transportation from Station A to Station B in one direction only, and a single ticket was issued for the entire party, what, in your experience, was the name by which such tickets were designated?

A. It was generally called a theatrical or troup ticket.

R. D. Q. 41. Were those tickets, in your experience, regularly on sale at all stations, so that any number of persons traveling together could avail themselves of the cheaper rate?

A. They were generally on sale at the larger stations, but could only be sold upon an order that was usually issued from the general office or some authorized suboffice of the passenger department.

R. D. Q. 42. So that the ordinary ticket agent would not sell such a ticket to whoever applied, unless he received special authority for that special occasion from some one of the more important officers of the road?

A. No, sir.

184 R. D. Q. 43. You have said in your examination that the use of these tickets was generally confined to parties of ten or more persons, but that occasiona'ly a less number were permitted to use such tickets. Is it not true that the railroad companies themselves made the definition of what a party should consist in order to avail themselves of the reduced rate?

A. I think so.

R. D. Q. 44. Is it not true that the association of railroads at times defined of how many persons a party should consist?

A. Yes, sir; there was usually an agreement of that kind between the railroads who were members of an association, as it often covered competitive business.

R. D. Q. 45. When these tickets permitting parties to travel in one direction, or a party to travel in one direction upon one ticket, first went into effect, how many persons were required to compose a party either by agreement or by regulation of your company?

A. As a rule, not less than ten.

R. D. Q. 46. I understand your testimony to be that these tickets which you classify now as party-rate tickets or theatrical trip tickets were sold occasiona'ly only?

A. Yes, sir.

Recross by Mr. BOND:

R. X Q. 47. You say they were sold occasiona'ly, Mr. Farmer? Isn't it a fact that they were sold whenever occasion called for them?

A. Yes; whenever we had a party that would come within the rules.

185 R. X Q. 48. You have used the term theatrical or troup ticket. That was the term used by the Pennsylvania Railroad Company, was it not?

R. X Q. 49. And other companies had different names for substantially the same thing, did they not?

A. I think so; that term was used mainly because that was the principle use for the ticket.

LESLIE P. FARMER.

Subscribed and sworn to before me the 2nd day of June, 1890.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

186 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered, that on this 26th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner, duly appointed by the circuit court of the United States, for the southern district of New York, in the second circuit, under and by virtue of the Revised Statutes of the United States, did call and cause to be and

personally appear before me, at the Grand Central Depot, in the city of New York, in the said southern district of New York, in the State aforesaid, George H. Daniels, to testify and the truth to say, on the part and behalf of the complainant in a certain suit or matter of controversy, now pending and undetermined in the circuit court of the United States, for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is complainant, and the Baltimore and Ohio Railroad Company is defendant.

And the said George H. Daniels being about the age of forty-seven years, and having been by me first cautioned and sworn to testify to the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said George H. Daniels, and he did thereupon depose, testify, and say as follows, viz:

By Mr. SAFFORD:

187 Q. 1. What is your name, age, residence, and occupation?

A. My name is George H. Daniels; I reside in New York; I am 47 years old; and I am general passenger agent of the New York Central and Hudson River Railroad.

Q. 2. State briefly and in a general way the history of your railroad experience?

A. Well, I was for seven years general freight and passenger agent of the Chicago and Pacific Railroad, two years general ticket agent of the Wabash, St. Louis, and Pacific Railroad, eight years a commissioner for a number of roads in the west, at the head part of the time of the freight and passenger business both, but the last three years of my service in that capacity I was at the head of the passenger department of the Central Traffic Association; and for a little more than a year I have been in this position here; this is continuous service during the past eighteen years.

Q. 3. Confining your testimony to a statement of what was understood prior to April, 1887, the time the interstate commerce law was passed, were there at that time, and had there been for several years previous thereto, a kind of ticket in use called a commutation ticket?

A. Yes, sir; there had been and there were at that time.

Q. 4. During the same time if a party of ten or more persons were carried over a railroad in any one direction and on one ticket, what was the general name, if any, given to such a ticket by railroad people?

188 A. There was such a custom quite prevalent in the West, at least, and the ticket was styled a party ticket in some places, and in other places a theatrical ticket, as it was mainly used—at least on many roads in the West—by theatrical companies.

Q. 5. Referring now to the ticket which you have said was called a party ticket or a theatrical ticket, whether or not, in your opinion, that ticket was considered as within a class of tickets called commutation tickets?

A. As far as my knowledge goes, it was not considered a commutation ticket.

Cross-examined by Mr. BOND:

X Q. 6. Mr. Daniels, prior to 1887 you have said that parties were carried generally at a reduced rate; was there any regular form of ticket? Is it not the fact that the ticket was made up on a skeleton form to meet the occasion?

A. On some roads I think a skeleton form was used, the blank being used to fill in the number—it might be nine or ten or fifteen, or whatever the party contained, and quite generally I think that was the case. In other cases a graduated card was issued to the party, that if they had ten people it would require so many tickets to carry the party with this card, the card being their authority for securing the reduction by getting, say, nine tickets for ten persons or ten tickets for twelve persons, or whatever that might be, but the tickets were mainly—I think almost generally—a skeleton form.

X Q. 7. Now the rates, were they graduated in proportion to the number of passengers?

189 A. In some cases, I believe, they were, though I believe the intention generally was, and that was practically the agreement of the lines, that the rates should be about two cents a mile; it might vary a little from that, either one way or the other, but generally two cents a mile was considered the fair rate. The rate was decreased as the number of the party increased.

X Q. 8. Can you produce samples of tickets, such as you have mentioned, used on the Wabash system prior to 1887?

A. I can, as while general ticket agent of the Wabash, very soon after the consolidation of the lines east and west of the Mississippi River, I found so many styles of tickets on various parts of the system as to make it very confusing to agents and conductors, and I finally called all the tickets in and issued a complete new stock, putting a fac-simile of each form of ticket into the book of instructions, of which I now give you a copy.

(It is agreed by counsel that this book may be referred to or used as evidence so far as the same may be considered material by either party, and it is marked petitioner's Exhibit No. 1, J. A. Shields, com'r.)

X Q. 9. Prior to 1887 it was the general custom of the railroads to give a reduced rate of fare to large parties or to individuals traveling frequently or for long distances, or contracting for a large amount of transportation below the single-fare rate, was it not?

A. Yes, sir; it was quite generally the custom.

190 X Q. 10. Instances of that custom were found in mileage tickets, excursion tickets, commutation tickets, and these tickets, such as you have referred to, which you do not classify as commutation tickets They are all instances of the same class of business, are they not?

A. They are; yes, sir.

X Q. 11. Different forms were used to meet the requirements of different classes of passengers, I suppose; am I right?

A. Yes, sir.

X Q. 12. Did the roads with which you were connected use tickets good for a specified number of trips or passages?

A. Yes, sir; tickets of that character were issued; ten, twenty-five, fifty, and one hundred rides were the usual forms for that kind of ticket.

X Q. 13. And they again were divided into individual, family, and firm trip tickets, were they not?

A. Yes, sir.

X Q. 14. Were there on the roads with which you were connected such tickets issued good for anybody or everybody?

A. No, sir; a family ticket would be good for a man or any member of his family, including the servants employed. An individual ticket would be good only for the individual named, and a firm ticket would be good for every member of the firm, the names usually being written on the back.

X Q. 15. Were not also on the Western roads tickets good for a man and his employés?

A. Some roads issued them; yes, sir.

X Q. 16. On those tickets a man could ride and carry with him
191 on the twenty-five-trip ticket himself and twenty-four employés one way, could he not?

A. Yes, sir.

X Q. 17. In what territory were such trip tickets issued, or were they confined by territory at all?

A. They were confined, as a rule, to a distance of, say, about 50 miles, say from Chicago and St. Louis and Cincinnati mainly to what would be termed the commutation district, where people would be likely to go out and in every day or nearly every day.

X Q. 18. Were they issued outside of those limits, if you know?

A. No, sir; I think not, except in the case possibly—in fact, in fact, I know that to be the case between Milwaukee and Chicago. Those cities are about 85 miles apart, but there is a large travel between the two cities every day. No such tickets were issued between Chicago and St. Louis, for instance.

X Q. 19. But they were issued between Chicago and Milwaukee?

A. Yes, sir.

X Q. 20. How was it with the family tickets, the fifty-trip ticket; were they not generally sold at any station between stations?

A. Yes, sir; quite generally.

X Q. 21. They were not confined strictly to suburban limits?

A. Well, I didn't mean in that way. They would be sold at any station within the commutation limit, and in some instances between other stations, but very little used in that way.

X Q. 22. Which of these tickets that you have described as in use before the passage of the interstate-commerce law would you include
192 in the term commutation tickets and what other tickets, if any, would you include under that class?

A. Well, I would include as a commutation ticket any ticket that was sold to a person at a reduced rate, to be used within a certain time, and to be good between certain stations for a given number of trips.

X Q. 23. Then you have in mind the time tickets, monthly or other, and the trip tickets which you have mentioned?

A. Yes, sir.

X Q. 24. And what else?

A. I would include in it a yearly ticket, a quarterly ticket, a monthly ticket, and ten, twenty-five, fifty, or one hundred rides, either of those.

X Q. 25. Mr. Daniels, what reduced-rate tickets have you in force today on the New York Central and Hudson River Railroad and the other roads of which you are general passenger agent?

A. Well, we have a yearly ticket, a quarterly ticket, two or three kinds of monthly tickets—a monthly ticket for people who go every day and

also a monthly ticket for children who are going to school, called a school ticket, which is also used for teachers in some places, and then we have a strip ticket with from ten to twenty coupons which is used by the bearer.

X Q. — Will you produce and file with the commissioner, to be attached to your deposition, a sample of such strip ticket, and of your monthly commutation ticket, and also copies of the commutation passenger tariffs?

193 A. I produce the strip ticket, the book ticket, and copy of passenger commutation tariff as requested and hand them to the commissioner.

(The question and answer are objected to. The tickets produced by the witness are marked Defendant's Exhibits 1, 2, and 3. J. A. Shields, com'r.)

X Q. 27. Were the same tickets and tariffs in use prior to and at the time of the passage of the interstate-commerce law on this road?

A. Yes, sir; the same forms and the same rates.

X Q. 28. Would you classify that strip ticket as a commutation ticket?

A. Yes, sir; I think I would.

X Q. 29. Why?

A. Because it is sold to the same class of persons and for the same kind of service as the book form of commutation ticket; it is another form intended mainly for the convenience of families of commutors.

X Q. 30. I understand you, then, as confining the term commutation ticket to tickets used or for the use of suburban travel?

A. Very largely so, yes, sir; though we do issue them between stations along our line at Rochester, Syracuse, Utica, Albany, and Buffalo, and quite a number of points along the line where people live out four or five miles, or ten miles and ride in, but the bulk of our business, of course, is into and out of New York City.

X Q. 31. Do you issue such strip tickets between any of the larger points on your line?

A. No, sir; the longest distance, I think, is about 37 miles.

194 X Q. 32. Suppose a similar ticket were issued and used between Philadelphia and New York, how would you classify that?

A. Well, I should class it as a commutation ticket.

X Q. 33. That is, a commutation ticket, in your understanding of the term, is one issued where there is frequent travel?

A. Yes, sir.

X Q. 34. It is not the form of the ticket, but the character of the travel that would determine the classification in your mind?

A. Yes, sir; the form of the ticket and the character of the travel should be taken into consideration in my mind in stating what a commutation ticket was.

X Q. 35. You have stated the particulars in the character of the travel; what particulars in the form of ticket?

A. Well, I don't mean exactly in the form of the ticket, but in the character of the ticket; for instance, I wouldn't call a card ticket that could be torn in two in the middle and one part used for the going passage and the other for the return passage a commutation ticket; I would call that an excursion ticket, because it was simply intended for one trip out and back. A commutation ticket, as I have always considered it,

means that a man undertakes a certain amount of travel in a specified time and between specified points, and if he does that he is given, of course, a reduced rate in consequence of the amount of travel he takes.

X Q. 36. Is it or is it not a fact that the charge is regulated by the frequency of the service and the amount of travel?

A. Yes, sir.

X Q. 37. That would in itself, would it not, show that the amount of travel contracted for was the consideration of the reduced rate?

195 A. The amount of travel and the time would be the principle considerations; yes, sir.

X Q. 38. You have mentioned excursion tickets. There was also a mileage ticket in use universally before the passage of the interstate-commerce law, was there not?

A. Quite generally; yes, sir.

X Q. 39. They had then in use at that time the mileage, the excursion, and the commutation ticket, as you define it?

A. Yes, sir.

X Q. 40. They were all recognized classes of tickets, were they?

A. Yes, sir.

X Q. 41. There was also this custom of transporting parties or companies at a reduced rate?

A. Yes, sir; that was quite general.

X Q. 42. As I understand your testimony, that was done in different ways by different roads?

A. Yes, sir.

X Q. 43. There was then no recognized class of ticket for that business, was there, in the same sense that mileage and excursion tickets were classed?

A. Yes, sir, there was; there was a theatrical ticket, and in many tariffs just previous to the passage of the act to regulate commerce there was a theatrical rate named, and it was a regular recognized rate; then there were the theatrical cards which I have described and of which you have a copy in one of the books, permitting a certain number of persons to ride on a less number of tickets than there were persons credited according to a regular rule, and that card was almost universal in the

196 West. It was used very largely. I was in the West at the time, and I don't know what the rules were in the East; but in the West that was almost an universal rule.

X Q. 34. Well, that could hardly be called a form of ticket.

A. Well, it was a ticket that the man had and a card authorizing him to go under certain conditions, the two together making the arrangement.

X Q. 45. At the time of the passage of the interstate-commerce law, what was the amount of this business of traveling parties?

A. It was quite a large business.

X Q. 46. Now there is one other question, Mr. Daniels. As a passenger expert, what do you think of the danger of the abuse of the party-rate ticket, so called, issuing one ticket for the whole party by speculators or ticket brokers?

(Objected to.)

A. A party-rate ticket couldn't be handled successfully by brokers, a ticket for ten or more persons.

X Q. 47. Have you ever known such a ticket to be manipulated? (Same objection.)

A. No, sir; I don't think I have.

Redirect by Mr. SAFFORD:

R. D. Q. 48. Mr. Daniels, this defendant's Exhibit No. 1 is a folder which you issued for the information of your patrons as to the terms upon which they could get tickets, is it not?

A. Yes, sir.

197 R. D. Q. 49. Now, on the cover of this you say that this gives the commutation, strip, and excursion ticket rates between New York and stations on the Harlem Division, do you not?

A. Yes, sir.

R. D. Q. 50. And turning to the inside, we find two headings with the different columns of figures, one marked regular ticket rates, then with a double line separating the figures in those columns from the remainder of the sheet, we find another heading of commutation rates. Now, under which one of those headlines is to be found the price of the strip ticket, which column?

A. Well, it is under the heading "Regular ticket rates."

R. D. Q. 51. And is divided by a double line from the commutation rates?

A. Yes, sir.

R. D. Q. 52. So that in making this folder for the information of the public, in order that they might understand about it, you did make a division and separate into classes these three different kinds of tickets—commutation tickets, trip tickets, and excursion tickets—didn't you?

A. Yes, sir; it seems to have been done in that way.

R. D. Q. 53. That was, I suppose, done in order that the patrons of your road might definitely understand the amount of money which they would have to pay for each different kind of ticket that you issued?

A. Yes, sir.

R. D. Q. 54. Now, then, referring back to this petitioner's Exhibit No. 1, which I see was in effect January 1, 1881, how many years did

198 that book of instructions remain in force on the Wabash system?

A. Well the princip'ele portions of it remained in force until the act to regulate commerce took effect, when some of those portions in regard to passes for theatrical people, and half rates for theatrical people, &c., were rescinded, but I think the princip'ele part of it is still in force there; I think they have not gotten out any new book of instructions since.

R. D. Q. 55. Now, on the 32nd page of these instructions to ticket agents, under the heading "No. 25½. Reduced rates for parties," I find that you stated that for parties from ten to fourteen persons there was to be a certain percentage of reduction, the percentage increasing as the party increased, and also gave general instructions to agents that when they had parties who desired to take advantage of these rates, "permission must be obtained in each case before the tickets are sold." Was that a regulation which was peculiar to theatrical certificates, as they seem to be called in this book?

A. No, sir; that was for an entirely different purpose; that was a round-trip ticket; if people wanted to go to some station and back again that day or the next day.

R. D. Q. 56. Then, if I understand you, because we might be misled about it, the instructions as to reduced rates for parties was not an instruction as to the theatrical certificate, which is No. XVII?

A. No, sir.

R. D. Q. 57. I find on this ticket XVII a direction to conductors to accept that ticket with three regular tickets for four persons?

A. Yes, sir.

199 R. D. Q. 58. If I understand your testimony, it is to the effect that if a party of four persons handed in this ticket with three one-way (not round-trip tickets) that the four persons would be carried on that combination, the three tickets and the one ticket?

A. Yes, sir.

R. D. Q. 51. So that it had been decided by the authorities, and by the officers in charge of the affairs of the Wabash Railroad, that a reduced rate of fare would be given to four theatrical persons traveling together in one party in one direction over the road. Am I right about that?

A. That is right; yes, sir; only theatrical persons.

R. D. Q. 60. Referring to your strip ticket, if the person had one of these tickets for 25 trips, on which you say the holder could travel himself with 24 others in one direction, supposing a party consisted of but twenty persons, would the carrier allow a rebate for the five unused portions of the ticket?

A. No, sir; we don't make a rebate.

R. D. Q. 61. So that in order to take advantage of your reduced rate as allowed by the strip ticket if a number of persons travel in the same direction and use the ticket all at once it would be necessary that the exact number of different portions of the tickets and the number of persons carried should coincide, or the party would be left with a number of those tickets on his hands, and the remainder of the ticket he would be obliged to use within a certain limit of time or lose the right to be carried over the road?

A. Yes, sir.

200 R. D. Q. 62. And what is the limit of these trip tickets?

A. One month on one division and three months on the other.

R. D. Q. 63. Was it not one of the characteristics of a commutation ticket that the party was permitted to ride in either direction within a limit of time and limit of stations?

A. Yes, sir.

R. D. Q. 64. Would you bring any ticket into the class of commutation tickets which did not permit the holder to pass in either direction over the railroad?

A. No, sir; I would not.

Recross by Mr. BOND:

R. X Q. 65. Mr. Daniels, I hand you a sample of special package ticket issued by the New York Central and Hudson River Railroad, marked "sample," which I ask you to hand to the commissioner to be filed with your deposition, and I ask you to state whether that was not the form of ticket used in the place and stead of and for the same purpose as the strip ticket?

A. Some years ago this was in use for the same purpose exactly as the present strip ticket, but it is not now in use here.

R. X Q. 66. For how many years was it in use?

A. I have no knowledge of it; it is not in use now. I understand the ticket was in use up to about 1886, when it was replaced by the present strip ticket under the same conditions, the same rates, and the same number of rides as the present strip ticket.

(The ticket referred to is offered in evidence and marked Defendant's Exhibit 4, J. A. Shields, commissioner.)

201 By Mr. SAFFORD:

R. D. Q. 67. These were sold in certain definite quantities; a man couldn't order eleven of those tickets?

A. No, sir; they were sold in packages of multiples of ten, fifteen, or twenty.

GEO. H. DANIELS.

Subscribed and sworn to before me the 6th day of June, 1890.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Adjourned to Tuesday, May 27, 1890, at 11 a. m., to meet at 346 Broadway, New York City.

NEW YORK, *May* 27, 1890.

Met pursuant to adjournment.

Present, counsel as before.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by
202 virtue of the Revised Statutes of the United States, did call and cause to be and personally appear before me at the office of the Trunk Line Association, at 346 Broadway, in the city of New York, in the said southern district of New York, in the State aforesaid, George R. Blanchard, to testify and the truth to say, on the part and behalf of the complainant in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of Ohio, western division, wherein the Interstate Commerce Commission is complainant and the Baltimore and Ohio Railroad Company defendant.

And the said George R. Blanchard, being about the age of forty-eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said George R. Blanchard, and he did thereupon depose, testify, and say as follows, viz:

By Mr. SAFFORD:

Q. 1. State your name, age, residence, and occupation?

A. George R. Blanchard; age 48; my residence is New York; my oc-

cupation is commissioner of the central traffic association, with headquarters at Chicago.

Q. 2. And you are chairman of that association?

A. Yes, sir.

Q. 4. State briefly and generally your railroad experience.

A. I have had an experience lasting through thirty years, during most of which time I have been connected with the traffic, passenger, and
203 freight departments of railroads, I was in charge of both the freight and passenger departments on the Ohio and Mississippi Railroad, on the Erie Railroad, and also have charge of both departments in the central traffic association.

Q. 5. Confining your testimony to the time prior to the passage of the interstate commerce law in April, 1887, whether or not it was the custom of railroads to issue a single ticket to parties traveling from station A to station B in one direction?

A. It was.

Q. 6. Whether it was the custom of railroad companies during that time to issue what were called commutation tickets?

A. It was.

Q. 7. Whether in your judgment the tickets of the former class were included in those of the latter class?

A. In my judgment they were distinct and separate forms of tickets. Perhaps a more accurate answer to your question is embodied in my letter to Mr. McCain, where I answered substantially the same question asked of me by him in a letter. That letter is as follows, so far as it relates to this subject: "Strictly speaking, the commutation ticket is one by means of which one and the same person or the members of one family can travel between stated points daily or at regular periods during a specified period at reduced rates of fare, made public and to be availed of by any one who conforms to their rules of issue. Per contra, one-way party rates had none of the characteristics of commutation rates, being for irregular travel of unknown numbers of persons at or above a minimum number between points often outside of commutation limits, and which points
204 varied with the applications of the parties traveling one way, such as theatrical troups, for illustration, going between New York and Elmira, between which points there were no commutation tickets. One-way party rates also differed from excursion tickets, the latter being to parties both ways instead of one. I should say therefore that one-way party rates were and are now considered a distinct class of travel apart from commutation travel."

Q. 8. What is the date of that letter?

A. February 14, 1890.

Cross-examined by Mr. BOND:

X Q. 12. Mr. Blanchard, isn't it a fact that prior to 1887 these parties that you have spoken of were carried not on any regular form of a ticket but on tickets made up on skeleton forms, or by means of what were known as theatrical certificates?

A. That was true with some roads; different companies had different forms for carrying them.

X Q. 10. There was, then, no general form of party ticket?

A. There was no party ticket applicable to the whole country. There were party tickets applicable within the territory of the different associations.

X Q. 11. In what form?

A. In the form of a card, entitling a number of persons stated in the card to travel upon the conditions stated thereon. Sometimes these cards accompanied the regular forms of tickets which were issued in addition to the card and directed the acceptance of eight tickets; for example for ten persons. I would like to quote from the proceedings of the central
205 passenger committee, April, 1886, showing that in that territory theatrical cards were issued. The resolution adopted at Cincinnati, April 12th, provided that theatrical rate cards now out be honored until the expiration of the time they are issued for, but no new ones be issued." This is on page 160 of the record of proceedings of the central passenger committee for the year 1886.

X Q 12. I call your attention to Ticket XVII in the book, Petitioner's Exhibit No. 1, and ask you to state whether that is a form of ticket such as you have mentioned?

A. Yes; this is one of the forms of theatrical certificates, which was not strictly limited to theatrical parties, but also included amusement companies generally, but the number of travellers conformed to the rules of the ticket.

X Q. 13. Prior to the interstate law, Mr. Blanchard, it was the universal custom, was it not, of railroad companies to make a lower rate than the regular single-fare one-way rate in consideration of the amount and frequency of travel contracted for?

A. I will not say that it was universal, but it was general.

X Q. 14. Among the forms of tickets evidencing such contracts there were then in use tickets good for a specified number of trips between designated points, good for individuals, families, firms, and individual firms, and their employés, were there not?

A. Yes; that was the class of travel usually known as commutation and mileage.

206 X Q. 15. Was there not a fifty-trip ticket in use between the cities of Chicago and Milwaukee and between the cities of New York and Philadelphia?

A. I have no knowledge upon that point at all.

X Q. 16. Were or were not trip tickets issued in the territory with which you are familiar in the form of package or strip tickets?

A. Yes.

X Q. 17. On such a package of tickets any number of persons could ride at the same time, could they not?

A. Not in all cases; the rules of different localities and roads differed; in some cases package tickets were sold in lieu of commutation tickets and in some cases package tickets were good for anybody who saw fit to use them; the latter was the more limited character of their use.

X Q. 18. The business or commercial principle on which these tickets that you have designated as commutation tickets were issued was the same business principle, was it not, on which parties were transported at a lower rate than individuals, although the form of ticket may have been different?

(Objected to.)

A. I should say not precisely; the commutation ticket, as I defined in my letter to Mr. M. Cain, was between well known points, and so were the package tickets so far as they applied, but the usual commercial ticket was on a thousand-mile form, where a passenger could travel between any points on the same line between a majority of which no commutation rates proper existed. The same principle which governed the thousand mile
207 ticket, governed the issue of one-way, party-rate tickets, except that the party-rate tickets were required to be issued between specified points, either stated on the card or the tickets accompanying it, whereas the thousand-mile ticket was good indiscriminately for a passenger to get on or off wherever he desired.

X Q. 19. The business consideration that induced the carrier to issue all these classes of tickets was substantially the same, was it not; that is practically the wholesale principle?

A. The business consideration which usually induced the railroad companies to issue package tickets, thousand-mile tickets, and one-way, party-rate tickets, was thereby to increase the frequency of travel, together with the additional and equally or more important consideration that as freight increased as the result of the sale of the thousand-mile tickets, so in the sale of the theatrical tickets they not only recognized the wholesale principle of the number traveling, but they also encouraged the larger increase of passenger traffic which flowed from the attendance of the public from station to station upon the theatrical performance given by those who held these special-fare tickets.

X Q. 20. The distinction then that you make between the present party-rate ticket and the commutation ticket is a distinction between the forms of tickets and between the territories or classes of passengers for whose use they were issued?

A. Not altogether. The commutation traveler, for example,
208 between New York and Passaic might travel regularly twice a day for 365 days in the year, while a theatrical ticket might be given to a company that didn't pass over the same road once in five years; the commutation ticket was, therefore, a recognition of the frequency of travel of one party between stated points, so that railway officers knew exactly how to provide for them, run trains, furnish the adequate number of cars, station facilities etc., for an income to be derived from them which was known beforehand by the railroad company and to the passenger, whereas the theatrical party-rate travel was irregular, depending upon the success of the entertainment offered, the public favor it was received with, and the conditions therefore were somewhat different, aside from the forms of ticket. They were both in my judgment reasonable concessions to travel of different classes as distinct and apart as the travelers who travel by the limited trains are distinct and apart from second-class passengers, but equally good business considerations favored the issue of the separate forms and fares to each.

X-q. 21. In your opinion as a railroad man, Mr. Blanchard, is the party-rate ticket, on which the party is transported on a single ticket, open to missuse or abuse by ticket-brokers or speculators?

A. The iron-clad form of ticket requiring the signatures and identifications of parties is rarely open to abuse. Of cource, if the ticket is held by the principle of a traveling company substitutions could be made of

one person for another within the limits of the number of persons
209 stated on the ticket, or theatrical managers having, if you please, seven members of a company might then buy tickets for ten and bring in three others. These forms of abuse are almost impossible to be detected or prevented, but the main use of a ticket is by companies so well known on the roads that the liability to abuse should not, in my judgment, debar their issue, if found desirable, for the reasons before stated.

X-q. 22. How did they compare in that particular with mileage and excursion tickets; were they more or less subject to misuse?

A. The mileage tickets throughout the country are usually identified tickets; in some cases not. Where they are not they are as much or more liable to abuse than mileage tickets. Excursion tickets are but little liable to the substitution of traveler, because they are sold to everybody at a uniform rate.

By Mr. SAFFORD:

R-d. Q. 23. The question was as to a comparison between the two; which was the most liable to abuse?

A. I think the mileage ticket was more liable to abuse than the one-way party ticket.

By Mr. BOND:

R-x-q. 34. Mr. Blanchard, from your observation could you give us an idea of the magnitude of this business in traveling parties prior to and at the time of the passage of the interstate-commerce law?

A. It would be almost impossible. I have no sources of information or standards of comparison before me. It was not kept in any
210 records that I have knowledge of apart from other classes of traffic.

R-x-q. 25. It was, however, a large business, was it not?

A. It was in the aggregate of the travel itself and in the outside additional travel which it induced an important source of passenger revenue.

By Mr. SAFFORD:

R-d. q. 26. You have said that the different roads had different methods of issuing these party-rate tickets. Is it also true that the different roads had different ways of issuing commutation tickets?

A. Yes.

G. R. BLANCHARD.

Subscribed and sworn to before me the 15th day of May, 1890.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

211 UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

Be it remembered, that on this 27th day of May, in the year of our Lord one thousand eight hundred and ninety, I, John A. Shields, a commissioner, duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the Revised Statutes of the United States, did call and cause to be and

personally appear before me at the office of the New York, New Haven, and Hartford Railroad Company, in the Grand Central Depot, in the city of New York, in the said southern district of New York, in the State aforesaid, Lucius Tuttle, to testify and the truth to say on the part and behalf of the complainant, in a certain suit or matter of controversy now pending and undetermined in the circuit court of the United States for the southern district of New Ohio, western division, wherein the Interstate Commerce Commission is the complainant, and the Baltimore and Ohio Railroad Company is the defendant.

And the said Lucius Tuttle, being about the age of forty-four years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Lucius Tuttle, and he did thereupon depose, testify, and say as follows, viz:

212 By Mr. SAFFORD:

Q. 1. State your name, age, residence, and occupation.

A. Lucius Tuttle; age, forty-four; residence at present, New Haven, Connecticut; occupation, general manager of the New York, New Haven and Hartford Railroad.

Q. 2. Now, you may state briefly and generally, Mr. Tuttle, your railroad experience.

A. Since 1868 I have been engaged almost exclusively in the passenger business, until the first of the present month, when I came to be general manager of the New York, New Haven and Hartford Railroad; I began as a ticket clerk in what was the Hartford, Providence and Fishkill Railroad, of Hartford; from there went to the New York and New England by consolidation, as assistant general passenger agent; from there to the Eastern Railroad as general passenger agent; from there to the Boston and Lowell Railroad as general passenger agent; from there to the Canadian Pacific as passenger traffic manager; from there to the Trunk Line Association as commissioner of the passenger department, and then to the New York and New Haven Railroad as general manager.

Q. 3. Was it the custom of railroads prior to the passage of the interstate commerce law to permit a party of persons to travel over a road in one direction and on one ticket at a reduced rate of fare?

A. Yes; so far as my experience goes I think nearly all railroads did that.

Q. 4. What descriptive name was given to that class of tickets, if any?

A. Well, so far as my experience goes and my knowledge of the
213 business of the roads I have been connected with and of the roads we did business with, those tickets went under the name either of special rate tickets or party tickets, my experience being confined, as you understand, to New England railroads; I can't say that other roads did not do otherwise, but that is my experience.

Q. 5. Now, did those same railroads at that time have in force what were called commutation tickets?

A. Yes.

Q. 6. Whether or not these two kinds of tickets were understood to belong to the same class of tickets or not?

A. I should say not, in my experience.

Q. 7. Will you state generally. Mr. Tuttle, the distinction which you have in mind as to commutation and what you call party rate tickets?

A. Commutation, as we applied it, meant tickets that were sold for regular travel between two stations, as for instance between Boston and Lowell, so that one person, or a family of persons, or the friends accompanying the owner of the ticket, might ride back and forth between Lowell and Boston, using that ticket either during its life or until the number of passages it gave had been taken up or punched out. The season ticket on some roads that I have been connected with had practically the same significance; season and commutation are interchangeable terms even to-day on the New York, New Haven and Hartford road; there is no such thing, I think, as a season ticket; everything is called a commuta-
214 tion ticket. That is, that gives a specified number of passages or a specified time. It is a yearly commutation instead of season ticket, but my understanding of the term season or commutation is that they have always been tickets sold between specified points for regular and continuous use of the railroad, the commutation being the giving of a special rate and a special ticket in lieu of the full fare, because of the continuous use. Now, as to the other question you asked concerning the party rate on the roads in New England, nearly all adopted what was called a theatrical rate ticket, and some either sold a ticket upon which a certain number of persons could travel or others allowed a party of persons to travel for a less number of tickets than the persons in the party on the presentation of a certificate that they were entitled to do so. These special rate tickets and party rate tickets were made good over any portion of the road by arrangement either upon a regular schedule or by application to the general office, while the commutation and season tickets were fixed rates and fixed tickets sold regularly in certain offices where there was a large amount of travel. We did not as a rule put commutation and season tickets in use on all portions of the road. We had them where the traffic was large enough to warrant it in and out of large cities, but if a man had occasion to travel much between irregular points, we might make him a special season ticket or a commutation ticket, but so far as party tickets went, my experience is that they were applicable for one way travel by certain schedules, either by theatrical rate or
215 special rate, and were not commutation tickets, and if any body could make that travel come within the commutation use they were at liberty to do so.

Q. 8. Were these theatrical tickets issued by the ticket sellers or by the more important officers of the company?

A. I think it was both ways. My impression is that the Boston and Albany arranged at one time to sell at any of their stations one way party tickets, solid tickets as they called them, on an order from the general office, so that a theatrical company holding an order to ride at two cents a mile for a certain number of persons might go to any ticket office where their order was applicable, and the agent would fill out, just as he does now your party tickets, but as a rule the arrangements were made at headquarters for the number bound from point to point, and the tickets sent out to meet the requirements.

Q. 9. In the case you mentioned of the Boston and Albany ticket, the theatrical company were required to have an order from some one in authority before they could obtain the reduced rate ticket?

A. As I understand it, yes.

Q. 10. So that in all instances it was left to the important officers of the railroad company to say what companies and what persons should use this reduced rate ticket, was it not?

A. That is the way I understand it.

Q. 11. You have on your road a very large number of commuters, who come into New York every day?

A. Yes.

216 Cross-examined by Mr. BOND:

X Q. 12. Mr. Tuttle, at the time of the passage of the interstate commerce law there was in existence on the New England roads, and particularly on the New York, New Haven and Hartford road, an enormous business in reduced rate tickets, by whatever name you call them, was there not?

A. Yes.

X Q. 13. And a large part of that business was interstate business?

A. Yes.

X Q. 14. Could you give any idea of the number of people carried a day under your definition of commutation tickets?

A. No, sir; I couldn't give you the slightest idea.

X Q. 15. Well, it forms what percentage would you say of the passenger business of the New England roads?

A. Oh, it would be a rough guess any way; it is so many years since I gave any attention to that sort of thing that I couldn't give you anything that would be worth considering as an answer. I should prefer not to guess, as it would be merely a guess, but it was a very large proportion of the business. The number of people who go in and out of Boston is enormous; the number of people who go in and out of New York is enormous. There is a large number going in and out of every large city, because you see the people live in the suburbs and work in the city. I think it has been estimated by some people that there were two hundred thousand people went in and out of the city Boston daily by the different railroads on various kinds of season and commutation
217 tickets, regular travellers.

X Q. 16. Won't you describe some of the forms of the tickets good for a specified number of trips in use on the New England roads at the time of the passage of the interstate commerce law?

A. If I understand what you mean, one kind was a card with, we will say, ten numbers printed at the margin, good between Boston, for instance, and Malden until used, or until the last number was punched, then the conductor lifting the ticket and returning it to the auditor's office. That was one kind; that was called a ten-ride commutation ticket.

X Q. 17. Could they be used by anybody?

A. Used by anybody.

X Q. 18. I mean more than one person at a time?

A. Yes; provided they presented the ticket together. If you, as the holder of the ticket, handed it up to the conductor, and paid the fares of ten people around you, it was acceptable for ten persons between the stations named.

X Q. 19. And similar tickets were issued for different numbers of persons above ten?

A. Well, according to the custom of the particular road. It wouldn't be the custom, for instance, of the Eastern Railroad to sell between Boston and Lynn ten ride, twenty ride, or thirty ride, or anything of that kind; they were either all ten rides or all twenty rides, except the monthly, quarterly and yearly tickets; those gave a round trip a day for the time specified.

X Q. 20. Did any of the roads in New England sell package tickets?

218 A. Yes, I think some of the roads continued to sell package tickets at the time the interstate law was passed, although that as a rule had gone out of use. Formerly nearly all the roads sold package tickets, so many for fifty dollars, or so many for one hundred dollars, but that had pretty generally gone out of existence. I don't know of any road that continued to do that up to 1887.

X Q. 21. And these ten-ride tickets had largely taken their place?

A. They had largely taken their place, the purpose of the road being to enforce the keeping of the ticket together and the presentation of it by the person who brought it and to prevent the distribution of the ticket between twenty different persons when the ticket was bought.

X Q. 22. There were also in use on the New England roads the mileage tickets, were there not?

A. Yes.

X Q. 23. That was a considerable part of the business done on those tickets.

A. Yes; a very large business done on those tickets by all the roads that issued them; some few roads did not issue those, but a very large proportion of their local traffic was carried on mileage tickets.

X Q. 24. These tickets were sold at a reduced rate?

A. Yes; and under different conditions upon different railroads; some of the roads made the mileage ticket good for whoever presented it or for any number of persons; others restricted it to the name of the person written upon the ticket; others made it good for the holder and his

219 family; others for a business firm; so that there was no one rule prevailing regarding the mileage ticket; each road made its own regulations.

X Q. 25. Were there also in use locally on any of the New England roads tickets specially adapted to the use of more than one person at a time?

A. Yes, and also for through business.

X Q. 26. Can you produce samples of such tickets?

A. I produced them and filed them with the commissioner; we do not use those at the present time for interstate traffic except at full rate.

(The samples referred to are offered in evidence and marked defendants' exhibits 5 and 6, J. A. Shields, com'r.)

X Q. 27. When did you cease to use those tickets for interstate traffic?

A. When it became improper under the interstate law, as we understood it.

X Q. 28. Was it before Judge Cooley gave an opinion to that effect?

A. That I am unable to say.

X Q. 29. Formerly, however, those tickets were used both for State and interstate traffic, were they?

A. At the pleasure of the company, yes.

X Q. 30. How were the rates regulated?

A. By circumstances, just as the business required.

X Q. 31. Were they scaled in proportion to the number of persons carried on the ticket?

A. That was a matter of arrangement for the individual parties when it happened; if it was a matter of competition, or if any other circumstance affected it, the company made whatever rate it thought fit, and issued the ticket for as many or as few persons as it desired.

220 X Q. 32. Do you know anything of a printed tariff for parties between New York and Boston?

A. Yes, there was a tariff scale according to the number of people who went, that was formerly in use for both single and round trips, I think. I don't know whether it is in existence for single trips now or not; my impression is that they only use it for round-trip business at the present time —excursions.

X Q. 33. That was in effect in 1887?

A. Yes.

X Q. 34. How would you classify these ten-trip tickets that you have spoken of?

A. I should describe those as commutation tickets.

X Q. 35. The distinction that you made, then, is between a ticket issued at a lower rate in consideration of frequent travel, which you term a commutation, and a ticket issued at a lower rate in consideration of the amount of travel contracted for, which you say you wouldn't term a commutation?

A. I could hardly answer that yes or no; I should have to give my own reason. My distinction between the term commutation and special rate comes simply from the matter of custom in naming those different tickets for convenience in the ticket offices, nothing more, nothing less; we had certain names for certain tickets; a ticket which gave a man or a family or a number of persons the right to travel daily between two points at a reduced rate was known in our office as a commutation or season ticket; a ticket which gave a party of persons the privilege of riding specially between two points for a specific purpose was called
221 a special rate ticket, or a theatrical rate ticket, or a party rate ticket.

X Q. 36. The commutation or season ticket might practically give the holder the same rights as the party ticket, for instance, to carry nine other persons beside himself?

A. Yes.

X Q. 37. But that wouldn't affect the question in your mind as to one of custom?

A. No, my point is this, that if a man having a party could take advantage of a commutation ticket which was regularly on sale there was nothing to prevent him doing so, but when he came in and made a special arrangement for his party he became a special party and used a special party ticket.

X Q. 38. The business or commercial consideration moving the railroad company in the instance of all these forms of tickets that you have mentioned, mileage, commutation, special tickets and season tickets, was really substantially the same, was it not?

A. Yes; of course every railroad ticket made its reduced-rate tickets for wholesale business.

X Q. 39. And the different forms which these trip tickets took were forms given them in order to adapt the evidence of the right to ride to the needs of the people who wished to ride; isn't that so?

A. Yes, that is so, or to the business needs of the company that carried them; there came to be a universal custom throughout the country of giving reduced rates to all sorts of people traveling by wholesale. The man who lived in the suburbs and came to the city for his daily
222 business used one kind of a reduced-rate ticket which was called usually a season ticket; and another man who lived in the suburbs and came to the city occasionally, once a week or twice a week, usually bought a ticket giving a certain number of rides, useable at his pleasure, or useable within three months or six months, and that was called generally, in my experience, a commutation ticket. The mileage ticket gave a certain number of miles anywhere upon the railroad or over specified portions of that railroad, and the conductor detached when the passenger rode, or the passengers for whom it was used, the number of miles actually used; then there was an arrangement on almost all roads for giving reduced rates for wholesale business, people traveling together, whether theatrical companies, ministers, women conventions, or anything else, which were called special rates or party rates. Now the technical definition of what is strictly a commutation ticket what is strictly a party-rate ticket, what is strictly a special-rate ticket, may be something too fine for me to decide, but I can only speak of the technical terms when these tickets were distinct in our different offices.

X Q. 40. From your experience and knowledge of the business, do you think that the party-rate single ticket good for a whole party is one subject of missuse or abuse by ticket brokers and speculators?

A. Under proper restrictions and with honest management of the railroad company issuing the tickets, no.

X Q. 41. How is it as compared with mileage and excursion tickets or any other form of ticket?

A. No worse under the same conditions.

223 X Q. 42. Than any other reduced form of ticket?

A. No worse than any reduced rate ticket provided the railroad company issuing it is disposed to be dishonest.

LUCIUS TUTTLE.

Subscribed and sworn to before me this 20th day of June, 1890.

JOHN A. SHIELDS,
U. S. Commissioner for the southern district of New York.

224 In the circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In equity, No. —.

To JOHN K. COWEN, *Attorney for the above-named defendant:*

Please to take notice that I shall take the deposition of L. P. Farmer at the office of the general passenger agent of the New York, Lake Erie

and Western Railroad Company, No. 21, Cortlandt street, in the city of New York, in the State of New York, at ten o'clock in the forenoon, on Monday, the 26th day of May instant, before John A. Shields, United States commissioner.

And at two o'clock in the afternoon of that day, I shall take the deposition of G. R. Blanchard, George H. Daniels, and Lucius Tuttle, at the office of the general passenger agent of the New York Central and Hudson River Railroad Company, Grand Central Station, in the said city of New York, before the said John A. Shields, as United States commissioner.

Said depositions to be used in the above-entitled cause on behalf of the petitioner.

A. G. SAFFORD,
Special Assistant District Attorney,
Attorney for the Petitioner.

UNITED STATES OF AMERICA,
District of Maryland:

Be it remembered, that at the city of Baltimore, in the district of Maryland, on this 22nd day of May, 1890, I then delivered to John K. Cowen, the attorney for the Baltimore and Ohio Railroad Company, the above notice to take depositions.

WILLIAM F. AIREY,
United States Marshall.

225 Circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, John A. Shields, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, do hereby certify, that on the days as indicated in the foregoing depositions, I was attended by A. G. Safford, esqr., of counsel for complainant, and by H. L. Bond, jr., esqr., of counsel for defendant, and by the witnesses, Leslie P. Farmer, George R. Blanchard, George H. Daniels, and Lucius Tuttle; that the said witnesses, who were of sound mind and lawful age, were by me first carefully examined, and cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, and the depositions of said witnesses were by consent of counsel for the respective parties taken down by a stenographer appointed by me for that purpose, in the presence of witnesses, and from their respective statements; and after the stenographic notes of the testimony had been reduced to writing on a type-writer, the same was read over by the respective witnesses, and they severally subscribed and swore to the same in my presence.

226 I further certify that the reason for the taking of the foregoing depositions is that the witnesses are material and necessary in the

cause in the caption of the said deposition named, and that they live at a greater distance than one hundred miles from the place of trial of the said cause.

I further certify that a notification of the time and place of taking the said depositions, signed by A. G. Safford, special assistant district attorney was made out and served on the attorney for the defendant, as appears from said notice, which is hereunto annexed. I have retained the said depositions in my possession for the purpose of mailing the same to the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimoney whereof, I have hereunto set my hand and seal this twentieth day of June, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourteenth.

[SEAL.] JOHN A. SHIELDS,

United States Commissioner, duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second District.

227, 228 And afterwards, to wit, but on the same day, there was filed in the clerk's office of the court aforesaid by the solicitors for the complainant the deposition of James L. Taylor, clothed in the words and figures following, to wit:

229 In the circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

WASHINGTON, D. C., *June* 14, 1890.

Met pursuant to notice. Present on behalf of the Interstate Commerce Commission, Mr. E. G. Safford. Present on behalf of the Baltimore and Ohio Railroad Company, Mr. Hugh L. Bond, jr. Present also the commissioner and Jas. L. Taylor the witness.

It is hereby stipulated and agreed by and between counsel that this deposition is taken pursuant to notice; that it may be taken by the stenographer, Wm. H. Smith, and reduced to writing by him, and when signed by the witness that it may be read in evidence with the same force and effect as if taken down by the commissioner in person.

JAMES L. TAYLOR, a witness of lawful age, called by and on behalf of the defendant, having been first duly sworn is examined:

By the COMMISSIONER:

Q. State your name, residence, and occupation.

A. My name is James L. Taylor; I am forty-two years of age;
230 my residence is Washington City in the District of Colmubia; my occupation is that of general passenger agent for the Richmond and Danville system.

By Mr. BOND:

Q. Mr. Taylor, will you please state briefly in a general way, your experience as a railroad passenger agent?

A. I have been connected in one capacity or another with the passenger business of the country, with various roads, for the last twenty years, commencing about 22 years ago. I have served the Jacksonville, Pensacola and Mobile road in Florida, the Atlantic and Gulf, the Savannah, Florida and Western roads in Georgia, and I have been with the Richmond and Danville system since 1886.

Q. You are familiar with the so-called party-rate ticket that is used on the Baltimore and Ohio Railroad?

A. I am familiar with it.

Q. Has the ticket been in use on the Richmond and Danville system?

A. It was until it was recalled in obedience to the mandate of the Interstate Commerce Commission, as we understood it.

Q. From your experience and observation, is it or is it not for the interest of the railway carrier, to issue such tickets as that or to make such a rate?

A. From my observation and experience I should say that the use of the party-rate ticket was profitable. We considered it to be so when we had it in use, and withdrew it simply to comply with the require-

231 ments of the Commission.

Q. Will you state the reasons that occur to you why such a ticket, issued at a reduced rate, is for the interest of the carrier?

A. The considerations which moved us in adopting party rates or party tickets were principally, perhaps, that it influenced the theatrical companies to travel over our lines. While it applied to other parties, its principal use was to encourage the transportation of theatrical companies over the southern roads. The points at which it is profitable for them to exhibit are at considerable distances from each other, and the cost of transportation being a considerable item of their expense, we thought it best to encourage the business by giving them a discount from the regular rate, varying according to the number of the party, for the purpose of encouraging the business over our lines. When it was first used it was confined almost exclusively to theatrical companies. Afterwards it was made to apply to all parties of the same number, but even after its application was extended to include all parties, our experience was that it was generally confined to the use of theatrical companies.

Q. At what rate were those tickets issued over the Richmond and Danville system?

A. The per capita rate for parties of ten or more persons travelling in a body on one ticket, for use between points south of the Ohio and

232 Potomac Rivers and east of the Mississippi River were as follows:

Ten to fourteen persons, inclusive, two and one-half cents per mile.

Fifteen to twenty-five persons, inclusive, two and one-quarter cents per mile.

Over twenty-five persons, two cents per mile.

The shortest combination of mileage may be used in computing rates between competitive points.

Q. Was it your experience that the additional travel induced by the reduced rates more than compensated the railroad for the reduction in the rates?

A. That was the principle which guided us in fixing the rates.

Q. Will you describe briefly the other forms of the reduced-rate tickets in use on the Richmond and Danville system, stating at the same time the object of their use and the character and extent of the use made of them.

A. Beside the party rate we have had in effect excursion rates so called, winter excursion rates and summer excursion rates, to the principal places of resort on our line and reached by our lines through our connecting lines. These tickets are issued at a reduced rate as compared with the regular tariffs, for the purpose of inducing persons at a distance to travel to these resorts either for health or pleasure, according to the season. In addition to these season excursion tickets we have had what we call round-trip or excursion tickets, for a limited period of two days. We
233 have monthly school tickets, monthly commutation tickets, quarterly commutation tickets, and trip tickets for trips of twenty-five and over between fixed points. We have had, also, mileage tickets, which we issue in amounts of 1,000 and 2,000 miles. A mileage ticket issued for an amount of 1,000 miles is confined to a single division of our system. The mileage tickets which are issued for the amount of 2,000 miles are good for passage over the entire Richmond and Danville system, which now embraces upwards of 3,000 miles. I think the tickets named, perhaps, embrace all the kinds which we issue at rates less than the regular tariff, as applied to individuals.

Q. What are the considerations that induced the railroads of the system that you represent to make the reduced rates represented by the tickets that you have referred to?

A. In the matter of the season excursion tickets referred to, we have the inducement named in the answer to the previous question. The increase of the travel justifies the concession. In regard to the school tickets, the monthly commutation, the quarterly commutation, and trip tickets, certain designated numbers, they induce a daily and constant movement between the fixed points which justifies us affording special facilities, and the regular and constant movement of the traffic also justifies the
234 concession that we make in the rate. The mileage ticket is principally used in our experience by commercial men who travel over the system largely, exhibiting samples of wares and producing trade in that way. We find them to be the principal purchasers of these tickets, and we think in the interest of promoting trade and traffic between the several points that we are justified in making the concession that we do in the rates for these tickets.

Q. In the case of the mileage ticket it has always been a question, has it not, so far as the direct revenue is concerned, whether the railroad company increases the travel sufficiently to make up for the reduction of the rate, taking into account the fact that the small merchant does not visit the large cities as often as he otherwise would?

A. I do not know whether that question has ever been considered by us in just the shape in which it is asked. We consider that the concession is participated in by both the departments of the road which make the revenue—both the passenger and the freight departments—and whatever

injury might be experienced in the passenger revenue we think would be more than offset by the benefit that would accrue to the freight department. I suppose that the concession might be construed to be as much in the interest of the freight department as in interest to the passenger department, the two being very closely allied, and the general result being one that we keep in view.

235 Q. Has it been the practice of the railroads in the territory with which you have been familiar to make the reduced rates which you have mentioned; and, if so, how long has that practice continued, to your knowledge?

A. The issue of these excursion tickets has certainly existed for more than 15 years with the roads I am familiar with. The mileage tickets, although not in the same form as at present, have been issued by the roads with whose practice I am familiar during the same period. My experience with commutation rates, or what we designate as commutation, has been more particularly since my connection with the Richmond and Danville system. In my previous service they did not figure to the same extent or to anything like to the same extent that they have done since. At our principal points, Washington, Richmond, Atlanta, and Augusta, and other points, we offer in these commutation rates an inducement to a constant patronage of the lines between fixed points, believing that thereby we create a business by putting it within the reach of the residents and business men of the cities to live at places outside of the cities and avoid the inconvenience and expense of city life, at the same time giving them the facilities for the transaction of their daily business. That view of the question, I must say, was presented most prominently since my connection with

236 the Richmond and Danville system, and in my previous service it did not have anything like the same importance or prominence that it has since I have been connected with the Richmond and Danville system.

Q. The question refers more particularly to the time during which this practice has continued?

A. I would say, briefly, that my experience with commutation tickets may be said to have been confined almost exclusively to the time that I have served with the Richmond and Danville system.

Q. In your answer to the last question, you used the phrase "commutation tickets." As an expert in the railroad passenger business, what definition would you give to that phrase?

A. I would answer that out of our own experience entirely. I do not know that *their* is any standard technical definition accepted by all railroad men. It is rather an elastic and somewhat comprehensive term, so that my answer to the question will simply refer to our use and designation of the term. We apply it, generally speaking, to rates between fixed points based upon the continuous or daily movement of the passenger holding the ticket.

Q. What would be your definition of the phrase "commutation rates?"

A. My definition would be, a rate applied to tickets of the above designation.

Q. In the territory of the Richmond and Danville system, are the trip-tickets that you have referred to sold between any of the large cities?

237 A. No. Not between large cities, but in and out of the larger points, and points of more importance to the neighboring and adjacent stations.

Q. You have stated the business reasons or principles upon which these various tickets are issued to be sold. What, if any, is the distinction between the principle on which, from the point of view of the carrier, you make reduced rates for excursions and suburban travel, and those on which you make reduced rates for parties of ten or more travelling together.

A. There is, to a certain extent, a great similarity in the principles that govern the concession in the several instances. It may be said that in the South particularly our trains have to run between fixed points anyhow, and that there are certain charges and expenses in connection with them that are very little affected by the volume of traffic. Therefore, the more we can increase the traffic of the several characters, the more we believe we increase our profit in the running of those trains. I suppose that that may be said to be a general principle. We desire to increase the traffic over and above what may be said to be fixed or constant traffic, which we believe we would get any way. We think that what we may get in the shape of this additional traffic may be due very largely to the encouragement which we can afford to give it by special concessions in rates, etc.

Q. I understand then that the principle is that whatever the concessions would increase the volume of traffic to an extent more than sufficient
238 to compensate the railroad company for the reduction per ticket or per ride, the practice is and has been to make that reduction.

A. That has been done within certain limits. On every road there is a class of passenger traffic that may be, for this purpose, designated as local traffic, which is not to the same degree effected by the concessions that are made in the rates. But other classes of passenger traffic respond directly to the influence and rates. For instance, the suburban traffic in and out of Washington upon an occasion when we reduced the rates to points on the Washington and Ohio and Virginia Midland divisions responded almost immediately to the reduction in rates by an increased volume of traffic. That is a notable instance in point that fully bore us out in our opinion as to the wisdom of making the concession in these commutation rates, as we call them. We have been very well pleased with the result of the experiment. I do not believe that the response would be in anything like the same degree if we reduced our local rates generally all over the road, because the purely local traffic, while it would undoubtedly be increased to some extent in its volume, would not, in our opinion, based upon our past and present experience, respond as profitably to a reduction as the commutation rates, as we call them, because the volume is not so directly affected. Briefly, I may say, that the business of a general passenger agent is to study the various description of traffic, and base his con-
239 cessions largely upon his judgement and observation and experience.

Q. The principle upon which the passenger business is conducted, as you have just stated it, was the same before the passage of the interstate-commerce law as since its passage in that particular.

A. I would say that we consider that our liberty, so to speak, has been considerably abridged by the passage of the interstate commerce law, and, to a certain extent, by the orders which the Interstate Commerce Commis-

sion has issued explaining that law. We do not consider that we have the same priveleges as before. The same business considerations, however, existed then as exist now.

Cross-examination by Mr. SAFFORD:

Q. Mr. Taylor, you have described certain kinds of tickets. I think you named monthly commutation tickets, quarterly commutation tickets, school tickets, mileage tickets, and excursion tickets, and one-day tickets. Which of these tickets do you think properly comes within the class of "commutation tickets?"

A. As I said above, our application of the term "commutation" is to the rate between two fixed points, for instance, between Washington and Round Hill; and we think that any number of tickets issued for any term, say one month or three months, or six months, between Washington and Round Hill, would come under the term "commutation," which would of course include the 25-trip tickets and the school tickets. The designation, as we use it, is more for the purpose of particularizing the tickets than to make any difference in the general terms that comprise them.

240 Q. You would not include in the general class of "commutation tickets" these season excursion tickets?

A. No, sir.

Q. Nor the mileage tickets that you have described?

A. No; we would consider them covered by the terms excursion tickets or mileage tickets.

Q. Would you include the party ticket in the designation of commutation ticket?

A. Yes; they were known specially as party-rate tickets.

Q. When you had the party-rate ticket in force, that a reduced rate was given to parties of a particular size, on a sliding scale, as I understand you?

A. Yes, sir; the rate varying with the number of persons in a party within designated limits.

Q. Who determined how many persons should be permitted to avail themselves of the reduced rate?

A. In our practice the party rate was fixed by an agreement of the lines in the Southern Passenger Association, which comprised nearly all of the lines south of the Potomac and Ohio Rivers and east of the Mississippi River. I may say, that even lines that were not in the association adopted the same party rates after the association had adopted them.

Q. I suppose these tickets were in force before the Southern Passenger Association was organized?

A. Not in the territory referred to; but they were first adopted by the Southern Passengers Association.

241 Q. Some parts of your roads are within what you call the "commutation district," are they not?

A. Yes, sir; the vicinity of our stations.

Q. I suppose the officers of your road map out a district surrounding the large towns, and fix the rate for persons within that district, which you call the commutation district?

A. That is done by the passenger department.

Q. The point which I am making is that these commutation rates are not applicable to all of the stations or all of the travel on your road?

A. No; they apply simply to these points which are speedily designated. They are not of general or of uniform application.

Q. And the limits of the commutation district are prescribed by the general officers of your road?

A. Yes.

Q. Did you ever have a party-rate ticket in force on any of the roads with which you have been connected, where parties of less than 10 could have the reduced rates?

A. Not generally; although I suppose in some special instances rates were made to a party of less than ten. The general practice, however, was that 10 was the minimum number to which the party rate applied.

Q. Those persons who travelled upon a party-rate ticket received from the railroad company exactly the same accommodations that purchasers of a single ticket received, did they not?

A. It was construed to be a first-class passage.

242 Q. And the person who was riding on a party-rate ticket, as one of the party, and a person travelling upon a single ticket, received from the railroad company exactly the same service, did they not?

A. Practically the same.

JAS. L. TAYLOR.

Subscribed and sworn to before me this 20th day of June, 1890.

RANDOLPH COYLE,
United States Commissioner, D. C.

In the circuit court of the United States for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD Company.

Deposition of Jas. L. Taylor, for defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I certify that on the 14th day of June, A. D. 1890, before me, Randolph Coyle, a commissioner of the United States in and for the District of Columbia, at the office of the Richmond and Danville Railroad Company, in the city of Washington, in said district, No. 1300 Pa. ave., was produced and personally appeared before me Jas. L. Taylor, witness in behalf of defendant; and E. G. Safford, esq., appeared as counsel

243 for the plaintiff, and Hugh L. Bond, jr., esq., appeared as counsel for the defendant, and the said Jas. L. Taylor, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined deposed and said, as appears by the deposition hereto annexed.

And I further certify that the deposition of said witness was then and there reduced to writing by Wm. Herbert Smith, stenographer, agreeable to stipulation of counsel, and was, after it had been reduced to writing, subscribed by the witness in my presence.

And I further certify that the reason why the said deposition was taken is that the said witness resides at the city of Washington, D. C., more than one hundred miles from Cincinnati, Ohio, the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of the parties, nor interested in the result of this cause.

And I further certify that the fee for taking said deposition, $7.40, has been paid to me by the defendant, and that the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal at the city of Washington, in said District of Columbia, this 20th day of June, A. D. 1890.

[SEAL.] RANDOLPH COYLE, [SEAL.]
U. S. Commissioner, D. C.

244 And afterwards, to wit, on the 24th day of June, A. D. 1890, there was filed in the clerk's office aforesaid an agreement of counsel, clothed in the words and figures following, to wit:

245 U. S. circ't court, so. dist. of Ohio, western div.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

It is agreed between the parties to this cause, through their respective counsel, that the defendant is and at all times mentioned in the petition, before, during, and after the year 1887, has been a railroad corporation, incorporated by the State of Maryland by chapter 123 of the laws of 1826, owning and operating a line of railroad from Baltimore, Maryland, to Wheeling, West Virginia, and also operating lines of railroad in the States of Ohio, Pennsylvania, Indiana, Illinois, and West Virginia, including the lines over which the parties and rates mentioned in the petition were transported and made, which lines of railroad were so operated by the defendant under certain contracts of lease and operating agreements, by the terms of which the defendant was and is entitled to the possession and beneficial use of such lines of railroad, having all the rights to carry on the business of transportation and collect compensation therefor given by the charters of the several companies and the general law of the said States; that all laws and acts of the said States of Maryland, Virginia, West Virginia, Pennsylvania, Ohio, Indiana, Illinois, public or private, relating to the matter in controversy may be read from the printed statutes.

It is not intended to agree as to the legal effect of the lease, operating agreements, or running agreements between the defendant and other railroad companies, but to agree that all papers and documents relating
246 thereto may be considered as in the case.

A. G. SAFFORD,
Solicitor for the Interstate Commerce Commission.
JOHN K. COWEN,
HUGHE L. BOND, Jr.,
For Defendant.

And afterwards, to wit, on the eleventh day of August, A. D. 1890, there was filed in the clerk's office of the court aforesaid, an opinion of Judge Sage, which opinion is clothed in the words and figures following, to wit:

247 Circuit court of the United States, southern district of Ohio western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

Opinion of Judge Sage.

The bill is filed to enforce the opinion and order of the Interstate Commerce Commission against the respondent, upon the complaint of the Pittsburgh, Cincinnati and St. Louis Railway Co., that the respondent had put into effect and had in operation so-called "party rates," whereby parties of ten or more persons travelling together on one ticket were transported over its lines of road at two cents per mile *per capita*, the regular rate for a single person being about three cents per mile. The complaint was further that the respondent was in the habit of selling round-trip excursion tickets over its lines without publicly posting the rates therefor, which were less than rates for ordinary tickets.

The respondent admitted the facts as alleged, but denied that they were in conflict with the law.

The bill contains in substance the averments of the complaint, with the further averment that the respondent, in disregard of complainant's order, and in violation of the act to regulate commerce, persists in doing
248 each of the acts complained of, wherefore an injunction is prayed to restrain the respondent from further continuing said disregard, under a penalty of five hundred dollars for every day after a day to be named in the decree of this court.

The respondent admits the averments of fact in the bill relating to the sale and use of party-rate tickets, and justifies as in its answer to the complaint aforesaid, but denies that since the order made thereon it has failed or refused to post its rates for excursion tickets.

No testimony was taken in support of the averments of the bill denied by the answer, and at the hearing this part of the complainant's cause was abandoned, leaving as the only questions to be decided those relating to the sale of party-rate tickets as conducted by the respondent.

The facts are not in dispute. A single ticket is issued to a party of ten or more at the fixed rate of two cents per mile per capita, which is a reduction of about thirty-three and one-third per centum from the regular fare for a single person. This rate is scheduled and posted and open to the public at large. A question was made whether these tickets were known and recognized in railroad circles before and at the date of the passage of the act, as commutation tickets. The evidence of railroad men of experience and prominence was taken upon this point. It clearly establishes the negative of the proposition. Some of the witnesses went

further, and undertook to settle, by their testimony, whether party-rate tickets are commutation tickets; but that is a question of construction, to be determined by the court, and not by witnesses. Whether they were, at and before the passage of the act, generally known and recognized by those engaged in railroad business as commutation tickets, and how those words were then understood and used by railroad men, is
249 competent, for the reason that the presumption is that Congress employed terms used in that business, in the sense in which they were so used. Construing the testimony according to this rule, my conclusion is that party-rate tickets are not included in the letter of the provision in favor of commutation tickets in the twenty-second section of the act. Their use was confined chiefly to travelling theatrical troupes. They were not on sale to the public. Although kept at the larger stations, they could not usually be obtained without an order from the general office, or from some authorized suboffice of the passenger department. They were not regarded as, nor understood to be, commutation tickets, nor are they such within the meaning of the word "commutation," which, "as applied to railroad tickets, is defined by Webster to be the purchase of a right to go upon a certain route during a specified period for a less amount than would be paid in the aggregate for separate trips." The Century Dictionary gives the following definition: "A ticket issued at a reduced rate by a carrier of passengers, entitling the holder to be carried over a given route a limited number of times or an unlimited number during a certain period."

There is a general sense in which the party-rate ticket may be said to be a commutation ticket, although no more so than a mileage ticket or an excursion ticket; but the twenty-second section recognizes mileage, excursion, and commutation tickets each as distinct from the others, using the designations in their technical sense. The difference between commutation and party-rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured. The party-rate ticket is more like the excursion
250 ticket, the apparent difference being that the excursion ticket is to return to the starting-point; but as the return is frequently over another line, so that the excursionist is not carried both ways over any portion of the entire route, the difference is not material. For the purposes of this opinion, however, the party-rate ticket will be regarded as separate and distinct from mileage, excursion, and commutation tickets.

It is claimed that section 22 makes certain exceptions from the operation of the act, specifying mileage, excursion, and commutation passenger tickets, and that as party-rate tickets are not mentioned, and can not be classed as commutation tickets, the inference, under a well-known rule of construction, is that Congress intended to exclude them. Let us look into this matter. The first section of the act contains the general provision upon which the entire act is founded. It requires that all charges for the transportation of persons or property shall be reasonable and just, and prohibits every unjust and unreasonable charge. The provisions of the second, third, and fourth sections are specific, in the nature of definitions,

and in aid of the provisions of the first section. In this case we have to deal particularly with the provisions of the second and third sections, which prohibit unjust discriminations and undue and unreasonable preferences. The second section makes it unlawful, by any special rate or other device to demand, collect, or receive from any person or persons a greater or less compensation for any service rendered in the transportation of persons or property than is charged, demanded, collected, or received from any other person or persons for a like contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions. The third section forbids any undue or
251 unreasonable preference, in any respect whatsoever, to any particular person, company, firm, corporation, or locality, or any particular description of traffic; and to the same extent it forbids any undue or unreasonable prejudice or disadvantage. Now, it is to be observed at the outset that the act does not provide that there shall be no discrimination. The prohibition is against unjust discrimination, undue and unreasonable preference or advantage, and undue or unreasonable prejudice or disadvantage. Apparently recognizing, as the law has recognized, that discrimination within just limits is essential to the successful conduct of the business of the common carrier, as it is to the successful conduct of every other business, but beyond those limits destructive, Congress attempted nothing more than to fix and enforce the limits, and this consideration furnishes the key to the proper construction of the act.

Now let us turn to section 22. It is referred to as specifying exceptions to the operation of the act. But are they exceptions? Did Congress intend to say that certain unjust discriminations, and undue and unreasonable preferences and advantages—that is to say, those mentioned in the twenty-second section—should be excepted? What are they? Here is one of the first: "The free carriage of destitute and homeless persons transported by charitable societies." Would that be an unjust discrimination, but for the "exception" in its favor? Unjust, to whom? Would it be less unjust to leave it to the other passengers to take up a collection and pay their fare, or submit to see them put off the train? "Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National or State homes for disabled volunteer soldiers, or of soldiers' and sailors' orphans' homes."
252 Are these unjust discriminations, or undue or unreasonable preferences or advantages, and was the twenty-second section necessary to legalize them? These provisions seem to be rather by way of recognition that the free carriage and reductions referred to are returns, slight and inadequate indeed, but proper to be made by railroad companies for the great franchises bestowed upon them without money and without price. Again, "nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees." Can it be possible that without this provision it would be necessary for the president and directors of the company to provide themselves with tickets before starting out on a tour of inspection of the road, and that every conductor and locomotive engineer and fireman would have to pay full fare for every trip? Yet this follows logically if the twenty-second section is a section of exceptions. The analysis might be applied with like results to every specifica-

tion contained in the section, but these will suffice. The language is "that nothing in this act shall prevent," and "nothing in this act shall be construed to prohibit," expressions evidently used interchangeably. The word "exception" is not to be found in the section, but there is the significant provision that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," indicating that the act was understood by Congress to be declaratory, and for the prevention of abuses and evasions of the unwritten law, which was adopted and incorporated into the statute that its construction and operation might be uniform throughout the land, and that it might be enforced by sanctions of Federal legislation. Mileage, excursion, and commutation tickets are mentioned in the section. All these were universally regarded as just and neces-
253 sary discriminations, but—mileage tickets especially—subject to abuse. No significance ought to be attached to the fact that party-rate tickets are not mentioned, for, as is above shown, they were not in general use, but were limited almost exclusively to travelling theatrical troupes.

The true construction of the section appears to be that it specifies certain discriminations not regarded by Congress as within the letter or spirit of the act; and therefore it provides that the act shall not be construed to prevent them, and the instances given are illustrative rather than exhaustive. It is a section furnishing an express rule of construction. It follows that the maxim *expressio unius est exclusio alterius* does not apply, but the true rule is to look to the section as a guide to the proper interpretation of the prohibitory clauses of the preceding sections, and exclude from their operation every discrimination which is within the principle of the particular cases mentioned in the twenty-second section. It is all wrong to cite it as authority for precisely such misconceptions and misconstructions as it was intended to prevent. Any construction which makes the statute a mere enactment of arbitrary rules, to be so administered as to force a rigid, inflexible equality, is in conflict with the objects which its framers had in mind, and a constant obstacle to the further development of a vast system of transportation in which new situations and conditions, continually occurring and requiring new adaptations and regulations, can be moulded into harmony with the provisions of the act only by regarding it as declaratory of principles founded upon wisdom and experience, and to be made beneficial and effective by being so expounded as to apply those principles to every new case that may arise.

This case finally depends upon the question whether party-rate
254 tickets as issued by the respondent are, upon a proper construction, prohibited by the preceding sections. It is claimed that they are obnoxious to the first section because they are not just and reasonable. While it is admitted that if their issue be confined to parties of ten or more the injustice would not be so apparent, it is urged that it would be left to the carrier to determine what number should make a "party," and that under the law, so construed, a reduced rate could be accorded to a party of two, as it is said was done before the act. The testimony on this point is, that almost without exception ten was the smallest number of persons to whom they were issued. At one time, upon the Union Pacific Railroad from the Missouri River to Colorado, they were issued to parties

of two. It is explained, however, by the witness who testifies to this fact, that the concession was made for the benefit of variety people who travelled in pairs, but that the rate was more than three cents per mile. The one other exception testified to was made by the Wabash Company, which gave a reduced rate to four theatrical persons travelling as a party; but this reduction was granted to theatrical persons only. It appears in evidence, also, that before the law there were voluntary traffic associations to which the leading railroad companies were parties, organized to prevent cutting of rates and undue competition. Party-rate tickets were then in vogue, and if, under those circumstances, the only departures from the rule of ten were those cited above, there would seem to be little ground for the apprehension expressed on behalf of the complainant, that to permit the continued sale and use of these tickets would open the door to all the evils which formerly existed. But suppose, for the sake of the argument, that the apprehension be well founded. The answer is two-fold: 1. It can not be doubted that whenever the sale of party-rate tickets is by any
255 means made a mere pretext for evading the law—as to take the illustration put, when a ticket is issued to two at a reduced price—merely to cut rates, the court will so treat it, and apply the remedy. The suggestion that if railroad companies have the right to issue party-rate tickets to companies of ten or more persons they may issue them to two is like the old objection to the right of transit with slaves—that if the master could hold his slave on free soil for an hour he could for a day, or a year, and therefore for life—which, although it puzzled many for a time, needed but a touch of common sense to explode it. 2. Nothing in the future of legislation is more certain than that whenever that abuse becomes prevalent the legislatures of the States will promptly reduce the individual rate to the same figure. The history of railroad passenger travel for the last forty years illustrates the constant tendency of special rates, including mileage, excursion, and commutation tickets, to reduce regular individual rates upon the one hand, especially for long distances, and upon the other hand to increase facilities and accommodations, thus rendering the service cheaper and better for the general public.

The next objection is that party-rate tickets are obnoxious to the second section of the act, because they furnish to one class of passengers transportation for lower compensation than is charged to others for like and contemporaneous service, under substantially the same circumstances and conditions; and to the third section because they give to one class of passengers an undue and unreasonable preference and advantage.

If this objection be true in statement, that is, if those travelling under party-rate tickets are charged less than individuals for like and contemporaneous service, under substantially the same circumstances and conditions, it is conclusive, and the issue of the tickets must be adjudged
256 unlawful. But how do they compare with mileage tickets, which by the twenty-second section are declared to be in harmony with the act? The rate for each is two cents per mile. The coupons for mileage tickets are for two miles each, but they are sold in blocks of five hundred, or for one thousand miles. The holder can use them at pleasure, for long or short rides. He may ride for any distance within the limit of his ticket, in the same car, and occupy the same seat with a passenger who is charged three cents per mile for his ticket. The holder of the mileage ticket is a wholesale

purchaser, the other buys at retail. The difference is recognized in every kind of business, and no intelligent, fair-minded person thinks of complaining of it. The mileage ticket, so the testimony declares, is especially liable to abuse and to be used by brokers for speculative purposes. The party-rate ticket, if not, as some witnesses testify altogether unavailable for either purpose, is less so than any other ticket, and reduces the opportunity for either to the minimum. It, too, is a wholesale ticket. It is open to all to purchase at the one fixed price. It has one peculiarly distinguishing feature. It is almost proof against fraud upon the company which issues it. The purchaser having a party of less than the number named in his ticket may, if not restricted by the terms of the ticket, fill up his party from the outside. That he would have a right to do, provided they all travel together, on the same train, as a party, and upon the one party ticket; for but one ticket is issued, and whoever of the party misses the train must buy an individual ticket at full rates, or lose the trip. Suppose a car-load of sixty persons be made up of passengers travelling on party-rate tickets, how much of the receipts from the sale of those tickets will fail to reach the treasury of the company? Not one dollar. Suppose the next car in the same train contains sixty passengers, travelling on individual tickets or cash fares, what would be the
257 comparative percentage of opportunity in the two cases for peculation at the expense of the railroad company? If a perfect safeguard against such peculations could be provided all over the country, to what extent would it tend to reduce railroad passenger fares, and to benefit railway shareholders?

Again, the testimony establishes that party-rate tickets secure patronage that yields large revenues to the respondent, and that the withdrawal of those tickets would almost entirely destroy that patronage; for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers. Are all these considerations to be left out of the account in determining whether there has been "like and contemporaneous service," "under substantially similar circumstances and conditions?" Does it depend solely upon whether party-rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are travelling from the same point to the same destination? Is that the full meaning of "similar circumstances and conditions?" The answer, which the question itself seems to suggest, is, that the phrase has a much larger and more comprehensive meaning, else Congress could not consistently have recognized mileage, or excursion, or commutation tickets, for all of these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation, the phrase must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons; or, in other words, circumstances and conditions of a commercial character, which, while they should not exclude or override the consideration of what is just and reasonably advantageous to those not so situated as to be able to avail themselves of reductions offered to the general public should be so recognized as not
258 to be prejudicial or unjust to any, and yet, upon the whole to promote, in the interest of all concerned, the beneficial operation of the act. Aside from the consideration that these tickets are in principle in nowise different from mileage, excursion, and commutation tick-

ets, which is decisive, the fact that they are on sale to all, without discrimination, and without advancing rates for single tickets, and the considerations above mentioned in favor of those who are upon the road continually, and whose business is upheld by bringing the cost of necessary travel within their reach; and those in favor of the carrier, including many not mentioned above, are ample for the vindication of the respondent against the charge that it is guilty of unjust discrimination, and undue or unreasonable preference, and therefore of violation of the provisions of the second and third sections of the act.

The further objection is made that the sale of party-rate tickets is obnoxious to the fourth section, because it permits the carrier to charge and receive a greater compensation for the transportation, under substantially similar circumstances and conditions, of passengers holding single tickets for a shorter distance, than for the transportation of others holding a party-rate ticket for a longer distance; but this objection is fully met by the answers to the objections relating to the second and third sections.

The bill should be dismissed at the costs of the complainant.

GEORGE R. SAGE,
District Judge.

A. G. SAFFORD AND JOHN W. HERRON,
For Complainant.

JOHN K. COWEN,
HARMON, COLSTON, GOLDSMITH & HOADLY,
HUGH L. BOND, Jr.,
For Respondent.

259 And afterwards, to wit, but on the same, there was filed in the clerk's office of the court aforesaid, an opinion of Judge Jackson, which opinion is clothed in the words and figures following, to wit:

260 United States circuit court for the southern district of Ohio, western division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 4336. In equity.

This is an application or proceeding under the provisions of the Interstate Commerce Commission for the opinion by this court of a writ of injunction or other proper process, mandatory or otherwise, to restrain the Baltimore & Ohio Railroad from further continuing in its violation of certain orders of said Commission, and for a decree requiring said railroad company to pay such sum of money, not exceeding the sum of $500, for every day after a day to be named in the decree that said defendants shall fail to obey the said injunction or other proper process.

The orders of the Commission which this court is asked to enforce by its injunction or mandatory process was made upon a complaint filed before the Interstate Commerce Commission by the Pittsburg, Cincinnati and St. Louis Railway Company [against the Baltimore and Ohio Railroad Company], which set forth and alleged that the petitioner was duly encor-

porated under the laws of Pennsylvania, West Va., and Ohio, and was engaged as a common carrier in operating a system of railroad extending from Pittsburg, Pa., to various towns and cities in said States; that the Baltimore and Ohio Railroad Company was duly incorporated under the laws of the State of Maryland, and was also a common carrier operating a system of railroads, a part of which extended from said city of Pittsburg to many of the important towns & cities in the above-named States, which were reached by petitioner's lines of road, and thus made it a competitor of petitioner in respect to business between said points; that upon its lines of road on which business competitive with that of petitioner's was
261 transacted the Baltimore and Ohio Railroad Co. had put in*o*t effect and had then in operation so-called "party rates" whereby parties of ten or more persons travelling together on one ticket were transported over said lines of road, between stations located therein, at two cents per mile "per capita," which was less than the rate for a single person, the rate for a single person being about three cents per mile; that said Baltimore and Ohio Railroad Company was also in the habit of selling round-trip excursion tickets, good between points on its lines of railway, at less than rates charged for ordinary tickets, without publicly posting in its ticket offices or elsewhere the rates at which said excursion tickets were sold; that the issuance of said party-rate tickets and the selling of excursion tickets without posting the rates therefor were in violation of the interstate commerce act, in petitioner's judgment, and, for that reason, it had declined to place the same in effect upon its lines; that by reason of said party rates and excursion rates so allowed and issued by said B. & O. R. R. Co., traffic was directed from petitioner's lines to those of the B. & O. Company, and that petitioner was greatly damaged by loss of revenue thereby; wherefore petitioner prayed that the Baltimore & Ohio Railroad Company should be required, by an order of the Commission, to withdraw from its lines of road on which business competitive with that of petitioner's was transacted said "party rates," and to decline to give such rates in future, and also requiring said company to discontinue the practice of selling excursion tickets at less than the regular rates, unless the rates for such tickets were posted in its offices.

The Baltimore and Ohio Railroad Company answered said complaint, admitting the corporate character and business of the two companies as stated in the petition, admitting that it had and did sell, on or between special dates, round-trip excursion tickets at less rates than those charged for ordinary tickets without posting notice of the same in its
262 tickets offices, except by way of advertisement. It claims that excursion tickets so sold were such excursion tickets as are mentioned in the 22nd section of the act to regulate commerce, which the act did not require should be posted, and which it would be practically unless, if not impossible, to post; but that defendant published such rates through the usual means employed by all other railroad companies as by newspaper advertisements, hand-bills, &c. The defendant admitted that it had issued the so-called "party dates," which it claimed were in no way violation of the act to regulate commerce, but on the contrary were an accommodation to the public, necessary to the business of theatrical and amusement companies and others travelling together in a large body. The defendant also denies that the petitioner has any right to institute said proceeding before

the Commis'ion; that it was not such a complainant as the act to regulate commerce authorized to make complaint, its alleged injury from defendant's acts arising or resulting to it only as a competitive carrier; and defendant moved to dismiss said petition on said ground and because petitioner did not allege facts sufficient to bring it within any of the classes of persons, firms, corporations, or associations who could properly institute such proceedings. This motion was either not insisted upon or was denied, as the Commis'ion proceeded to hear and consider the complaint, and on February 21st, 1890, filed its report in the premises, holding, 1st, that passenger or excursion rates are required to be published according to the provision of section 6 of the act to regulate commerce, and that the practice of the Baltimore & Ohio Railroad Co. of selling round-trip excursion tickets at less than rates charged for ordinary tickets without publicly posting in its ticket offices the rates at which such excursion tickets were sold, was in violation of the law; and, 2nd, that party-rate tickets are not commutation tickets within the true meaning of section 22 of the
263 act, and when party rates to two or more persons travelling together on a single ticket are lower than contemporaneous rates for single passengers they constitute discrimination and are illegal. It was thereupon ordered and adjudged by the Commis'ion, first, that the Baltimore and Ohio Railroad Co. be and it is hereby required to print, post, and schedule showing the rates, fares, and charges now or hereafter established by it for round-trip passenger excursion tickets between points on its lines or between points on its lines and points on the lines of other common carriers with whom it joins or hereafter may join in establishing rates, fares, and charges therefor, in conformity with the provisions of section 6 of the act to regulate commerce; and

Secondly. "That the Baltimore and Ohio Railroad Company do forthwith wholly and immediately cease and desist from charging rates for transportation over its lines of a number of persons travelling together in one party which are less for *a* each person than rates contemporaneously charges by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points." Notice embodying said order, together with a copy of the Commis'ion's report and opinion, was duly sent to and received by the defendant.

Thereafter, on May 1st, 1890, the Interstate Commerce Commis'ion filed its petition or bill in this court against the Baltimore and Ohio Railroad Company, setting forth the foregoing proceedings before and orders made by the Commis'ion, and charging that the defendant, since the issuance and service upon it of said order, has wholly disregarded and set at naught the authority and commands of said Commis'ion; that it had neglected and refused, and still neglect' and refuses to furnish the Commis'ion and to print, post, and file schedule showing the rates fare and charges
264 established by it for round-trip passenger excursion tickets, as required by law, and as in and by the order of the Commis'ion it was enjoined and required to do; and further, that defendant had not ceased and desisted from charging rates for the transportation over its lines of a number of persons travelling together in one party on a single ticket, which are less for each person of such party than rates contemporaneously charged by it under schedules lawfully in effect for the transportation of single passengers between the same points, as in and by said order of the Com-

mis'ion it was required to cease from doing. After setting out various instances in which the defendant had, since the promulgation of said order issued such "party-rates" tickets, the petitioner on bill invokes the aid of this court to compell obedience on the part of defendant to the requirements of said order, and to punish it, as prescribed by the statute, for its continued disregard thereof.

The defendant duly entered its appearance and filed its answer. After admitting the proceedings before the Commerce Commis'ion, which resulted in the foregoing order, the defendant denied that it had failed and neglected since the issuance thereof to furnish to the Commission and to print, post, and file schedule showing the rates, fares, and charges established by it for round-trip passenger excursion tickets issued by it, as required by law, or even as required in and by the said order of the Commission. It admitted that it had not ceased and desisted from charging rates for transportation over its lines for *for* a number of passengers travelling together in one party upon one ticket, which was less for each person of such party of ten or more, than rates contemporaneously charged by it for transportation of single passengers between the same points. The particular instances of the issuance by it of such "party-rate" tickets set out in the bill were admitted to be substantially true. Respondent,
265 however, denies that as one party constitute any unjust discrimination, or are in violation of the law, and insists that so far as said order of the Commis'ion enjoined and required it to desist from the issuance of such "party-rate" tickets at less rates than are contemporaneously charged for single passengers between the same places it is illegal; that respondent has not complied, and should not be required to comply therewith, because it rests upon an improper finding that said "party-rate" tickets are not commutation passenger tickets within the true meaning of section 22 of said act to regulate commerce, because it is based upon an erroneous construction of said act, and because it was beyond the power of the Commis'ion to make it.

After referring to the general practice on the part of railroads before the passage of the act to regulate commerce of issuing special-rate passenger tickets of various kinds and forms, such as mileage, excursion, party, monthly, or quarterly, a specified number of trips for one person, or one trip by the specified number of persons, and ten, twenty, or thirty trip tickets at lower than the regular single-fare charges, based upon the principle that when the amount of travel thereby encouraged or developed would more than make up to the carrier for the reduction of the "per capita" rate, then such special rate was reasonable and just in the interests of both the carrier and the public. The respondant pr'ceeds to state "that since the passage of said act to regulate commerce this respondant has continued as heretofore the practice above stated, of making a lower charge on passenger travel, in consideration of the amount and frequency of the travel, and with that purpose and to accom'*a*date the various classes of passengers, it has continued in use all the forms tickets described in the next preceeding section. That the charge fixed by it for the trans-
266 portation of parties of ten or more on a single ticket, has been two cents per mile "per capita," which is the same rate charged on thousand-mile tickets, and is a higher rate than it charges on long-distance passengers travel and excursion, and higher than its general rates for sub-

urban on time or other suburban tickets. That the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carriers and of the public, because any higher rate would destroy the business. That the business reasons, circumstances, and conditions which induce respondants to make such lower charge, for the transportation of parties as aforesaid, and that make it the interest of this respondant as a carrier to make such lower charge, are precisely the same reasons, circumstances, and conditions that induce it, and make it its interest to fix a lower charge for transportation of passengers buying mileage tickets, time or trip tickets and excursionist. That while so-called "party-rate" tickets are principally used by travelling amusement companies, because no other form of ticket meets the requirements of such companies, yet this respondant has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large. That this respondant has obviated the changes that such lower charge for parties might be taken advantage of by speculators or ticket brokers by issuing only one ticket for the whole party. And the respondant avers that as such tickets are now issued by it they are not and can not be used for speculative purposes and afford no opportunity for evading the law in the hands of ticket-brokers. This respondant further avers that it may rightly and legally make a charge "per capita" for persons travelling on said party-rate ticket lower than
its charge for a single passenger making one trip between the same
267 points, the character, circumstances, and conditions of the service being substantially different, and that the making of such lower charge "per capita" to the members of the party notice is given no undue or unreasonable preference or advantage to him, and subjects no person, company, firm, or corporation or locality or particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

The charge that defendant had neglected and refused to print its rates for round-trip excursion tickets after the issuance and service of the Commission's order was practically abandoned at the hearing. It is therefore unnecessary for the court to express any decided opinion upon the question, as to which we have considerable doubt, whether a railroad company's rates on mileage, excursion, or commutation passenger tickets, or other special rates allowed by section 22 of the act to regulate commerce are required to be printed and posted in its offices, and furnished the Commission in conformity with section 6 of said act. Under section 22 of the act as originally passed it was declared "that nothing in this act (including section 6) shall apply to the issuance of mileage, excursion, or commutation passenger tickets." The section as amended by the act of March 2nd, 1889, provides "that nothing in this act shall prevent the issuance of mileage, excursion, or commutation passenger tickets." How far this change of phraseology operates to bring such tickets within the provisions of section 6 of statute, so as to require railroad companies to post this rate for such tickets, is by no means free from difficulty and doubt; but as the determination of the point is not necessary to a decision of the case before us we do not deem it proper to pass upon it.

The real controversy in the case is confined to the validity of the Commission's order requiring the defendant to desist from the issuance of

"party-rate" tickets for ten or more persons travelling together on
268 one ticket at a lower rate per mile and per capita than is contemporaneously charged for a single passenger between the same stations. This issue presents two leading and important questions, which involve the proper construction of sections 1, 2, 3, & 22 of the act to regulate commerce, under the fact established by the pleadings and evidence. First: Are the "party-rate" tickets in use by defendant embraced or included in the general designation of "commutation passenger tickets" which section 22, as amended by the act of March 2nd, 1889, does not prevent the railroad company from issuing; and, secondly: If such "party rates" are not "commutation passenger tickets" within the true meaning of said section, do they constitute either an unjust discrimination as defined and prohibited by section 2 or an undue or unreasonable preference or advantage as forbidden by section 3 of said act?

The last clause of section 1 of the act to regulate commerce adopted and established for the United States, in respect to interstate traffic, the general rule of the common law that all charges made by common carriers, subject to the provisions of said act for any service rendered in the transportation of passengers or property, "should be reasonable and just," and that "any unjust & unreasonable charge" for such service should be prohibited and *and* declared unlawful. No claim is made that defendant's charges for parties of ten or more, or for single passengers, have violated the provisions of said section. The reports and opinion of the Commission does not find that the rates in use by defendant for either "party rate" or single passenger tickets are in any way unjust or unreasonable charges for the service rendered in transporting either class; and the proof before
269 this court established that said "party rates" of two per mile are reasonable and just; that they are promotive of the interests of the railway companies issuing them, and a convenience to the public.

The right of the defendants to make and collect reasonable charges for its transportation service is a property right under its franchises of which it can not be deprived without due process of law. This is settled by the recent decision of the Supreme Court in the case of the Chicago, Milwaukee and St. Paul Ry. Co. vs. The State of Minnesota.

In considering the foregoing questions on which the proper determination of the present case rests the fact established by the proof and not controverted by or on behalf of complainant that defendant's charges for both the single passenger and the party of ten or more are reasonable and just in themselves should be kept in view.

Do "party-rate" tickets come fairly within the letter and spirit of the general terms "commutation passenger tickets" as used in section 22 of the statutes? Railroad experts, many of whom were examined in this case, differ considerably when they undertake to give an exact technical definition of the words "commutation passenger tickets." Their testimony showed, however, that prior to the passage of the interstate-commerce act railroad companies were in the constant habit of issuing a variety of special-rate tickets, such as mileage, excursion, monthly, or quarterly, family, school-children's, ten, twenty, or fifty trips, good for the specified number of trips by one person, or for one trip by the specified number of persons, round trip and party tickets, for ten or more persons travelling together on a single ticket either one way or for the round, and that all these different

classes and forms of tickets came within the designation of general description of commutation tickets or commuters' rates. This prevailing practice of the common carriers before the passage of said act, and which has been continued by many, if not by most of them, since the act went
270 into effect, may properly be looked to in placing an interpretation upon the words "commutation passenger tickets" which follow, and were manifestly intended to enlarge the special classes caused by the "mileage" and excursion passenger tickets. After enumerating two varieties of special-rate tickets under the heads of "mileage" and "excursion" which come within the commutation principle, the language is broadened by the addition of the general terms, "or commutation passenger tickets," thereby clearly indicating an intention on the part of Congress to allow or not to prevent the continuance of the general practice of common carriers to adapt their rates and charges to meet the wants and conveniences of different classes of the community while developing and enlarging their traffic. The proof before the court fails to show that mileage and excursion tickets differ in any essential particular from commutation passenger tickets so as to make them a different class of tickets from the latter. On the contrary the evidence established that they are particulars of the general class caused by the more comprehensive terms of commutation tickets or fares, which we think defendant's witness, Wm. B. Shattuc, has not correctly and properly defined in saying that "a commutation ticket is a ticket for one passenger, good for more than one ride, or for more than one passenger for one ride sold at a reduced rate." When, therefore, the particular classes of tickets (mileage and excursion) falling within the commutation principle are followed by the general terms "or commutation passenger tickets," this latter clause of the sentence, upon no sound rule of construction, should be taken or treated as presenting something in contrast with, or differing in character from the previously enumerated particulars, but rather be regarded and interpreted as enlarging such particulars so as to make the statute cover the whole subject of commutation tickets or rates in all this variety of forms and classes as were then in use by
271 common carriers subject to the act; provided only that such charges were reasonable and just. It is clearly shown by the proof that the same business reasons, considerations, and conditions which induce the most enlightened railroad management, having due regard both to the interests of their line and to the convenience of the public, to make reduced rates on mileage, excursion, long-distance, round-trip, time-trip, or a specified number of trip tickets apply in all their force to "party-rate" tickets for ten or more persons traveling together in one body on a single ticket. Reduced rates to these several classes or descriptions of passenger traffic rest upon the same general principle, which the act to regulate commerce nowhere calls in question, that common carriers may rightfully so adjust their charges as to encourage and develope travel, that the amount or volume of such traffic is a legitimate element to be considered in determining what reduction should be made over local or ordinary rate, so as to make both correspond with cost of service and the fair profit which the carrier is entitled to earn from each class of travel. Quantity of traffic affects both the cost of service and the legitimate profit which may be demanded for such service. When the profits on frequency of trips or larger numbers

transported at reduced rates reasonably corresponds with the fair profit of the carrier on a single trip, or smaller number transported at the ordinary higher rate, the carrier making such an adjustment of its charges with a view of encouraging and developing its legitimate business is only putting into practice the reasonable and well settled principles of any avocation or trade, which recognizes quantity, whether arising from the number or size of the transaction, as a proper element in the consideration and adjustment of price. No complaint was made against common carriers acting upon this principle. The complaint made against them, and which the act to regulate commerce sought to remedy and correct, was the practice
272 of showing favoritism and partiality between their customers or localities under the same or substantially the same circumstances and conditions.

The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations, which may influence common carriers in so adjusting them as to fairly *to* increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations the act does not and was not intended to restrict the common-law right and power of common carrier to make special contracts or adjust their rates with reference to existing wants and circumstances so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carriers as it existed as common law, which never questioned or denied to common carriers the right to give or make lower rates based on increased quantity or amount of service. No case arising under the English Railway Acts of 1845–1854–& 1873, so far as we have been able to find after careful examination, has ever called in question or impeached the right of carriers to fix rates and issue tickets based upon the consideration of the amount or volume of the traffic, nor disputed the reasonableness and sound business propriety of railroad companies granting reduced rates to parties traveling often, or furnishing increased traffic in the way of numbers; on the contrary, this right so to regulate and adjust their rates is uni-
273 versally recognized. While the English statutes relating to railway traffic embody the same general principles and seek to accomplish the same leading objects as our act to regulate commerce, they contain no such affirmative provisions or deduction as found in section 22, excluding from the operation of the law the enumerated, general, and particular cases in which special rates were not intended to be prevented or interfered with. Said section 22 should be regarded as a legislative declaration that not merely mileage and excursion, but passenger tickets generally based upon the commutation principle of conceding a reasonable reduction from regular local rates in consideration of the frequency (or quantity of the traffic), if reasonable and just in their charges, did not come within the evils sought to be remedied. To contend that a "party-rate" ticket to ten or more persons traveling together on a single ticket at reduced rates per

mile do not come within reason and or principle of commutation tickets, which are generally issued for only one way, because generally needed for only one direction, while admitting, as counsel for complainant does, that a round-trip ticket for ten or more persons traveling together at the same reduced rate would be considered as coming within the meaning of a commutation ticket as explained by complainant's expert witnesses, is drawing a distinction without any substantial difference. It rests upon no reasoning, involves no public policy or convenience, and is altogether too narrow and refined to suppose that Congress intended to make any such nice discriminations, in the language employed to express, in a general way, what the law was intended not to present.

The commission seems to have treated and construed section 22 as designating certain cases and instances of discrimination which are to be considered as exceptions, and which but for being so excepted would fall within the operation of sections 2 & 3 of the act, and that be-
274 cause "party rates" tickets are not specially and particularly named they should be excluded from the list of exceptions. We can not, in view of the whole scope and manifest purpose of the act, assent to this construction of said section. It should be given a broader and more liberal interpretation for the reasons already stated, and as thus interpretated we think that the section fairly recognizes, in respect to passenger traffic, the general principle of commutation, and that "party-rate tickets for ten or more persons traveling together in one body on one ticket at reduced rate per mile, which are reasonable and just, as issued by defendant, are within the letter and spirit of commutation passenger tickets" as these terms are employed in the statute. This construction of the section neither disregards the duties and obligations of the carrier to the public, nor ignores its just rights in the reasonable management of its business. The evidence before us shows that, if "party-rate tickets, as described and used by defendant, can not be lawfully issued or should be discontinued, the resources of common carriers derived from passenger traffic will be seriously impaired, while the convenience and benefit to the public, traveling in parties or bodies of ten or more, such as amusement companies, associations, clubs, organizations, delegates, and representatives attending conventions, religious, educational, or political, will at the same time be greatly interrupted and prejudiced.

Our conclusion on the first question presented is that said "party-rate" tickets as used by defendant are "commutation passenger tickets" within the true meaning of section 22 of the act to regulate commerce.

Secondly. But suppose it to be assumed that the defendant's "party-rate" tickets are not commutation tickets, as ruled by the commission, then the question remains whether they constitute an unjust discrimi-
275 nation as defined by section 2, or an undue or unreasonable preference or advantage to or any undue or unreasonable prejudice or disadvantage against any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever. The evidence discloses that originally "party-rate" tickets were issued only to theatrical or amusement companies, just as mileage tickets were to commercial travelers only; that since the passage of the interstate-commerce act said "party-rate" tickets are no longer confined to one class of passenger traffic, but, like mileage, time-trip, and excursion rates, are reg-

ularly scheduled and posted, and offered to the public at large, so that any and all parties of ten or more traveling together, who choose to apply for the same, have equal right and privilege of securing such tickets at the same reduced rates.

Does this concession to the public, traveling in parties of ten or more, and open indiscriminately to all persons of the requisite number who choose to avail themselves of the reduced rate by applying for a single ticket for the party, violate, in letter or spirit, the provisions of either section 2 or 3 of the act? In other words, may the defendant lawfully transport a party of ten or more persons on a single ticket at a less rate per mile & per capita than it charges for carrying a single passenger between the same stations? Does the fact that defendant charges the single passenger for a single trip a somewhat higher rate per mile than it charges for transporting ten or more passenger' as one party on a single ticket over the same distance, constitute unjust discrimination as defined in section 2, or undue or unreasonable preference or advantage in favor of such party of ten or more, or any undue or unreasonable prejudice or disadvantage against the single passenger as prohibited by section 3 of the act? The decision of this question involves the proper construction and interpretation of said sections, which must be read and considered in
276 connection with the provisions found in section 1 & 22 in order to arrive at their true scope and meaning. When thus considered, it is perfectly manifest that Congress did not intend to impose upon common carriers subject to the provisions of the act any rule or duty of absolute equality of rates in their charges for transportation services, subject to the requirement of section 1, that all charges made for any service rendered in the transportation of passengers or property, shall be reasonable and just; the language of section 2 clearly requires and implies that there may be discriminations which are not unjust & not prohibited. So, too, the language employed in section 3, declaring it unlawful to make or give any "undue or unreasonable preference or advantage" to any particular person, &c., or to subject the same to any "undue or unreasonable prejudice or disadvantage," clearly implies that there may be a preference or advantage on the one hand, or a prejudice or disadvantage on the other, which is not undue or unreasonable, and, therefore, not in controvention of the law. To be within the statute the discrimination must be unjust and the preference or prejudice must be "undue" or "unreasonable." The discrimination which is declared "unjust" is the charging and collecting, directly or indirectly, from any person or persons a greater or less compensation for any service rendered in transporting passengers or property than is charged, collected, or received by the carrier from any other person or persons, for doing for him or them a like and contemporaneous service in the transportation of like traffic "under substantially similar circumstances and conditions" when the traffic is not of like kind, or when the service is not "alike and contemporaneous," or when the transportation is not rendered "under substantially the same circumstances & conditions," differences in charges do not constitute "unjust discrimination." The evil which said sections intende' to remedy was the prevailing practice of railroad
277 companies of favoring or showing partiality in the matter of charges to one person, firm, company, or locality, as against another person, firm, company, or locality, for a like and contemporaneous service rendered

under the same or substantially the same circumstances and conditions. Said section' were intended to prohibit favoritism and partiality in traffic rates where the circumstances and conditions were substantially similar, and the service contemporaneous.

Persons in like situations requiring or desiring like or contemporaneous service on the part of carriers were to be treated in the matter of rates impartially. This is expressed both affirmatively and negatively in the language of section 3. The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company, or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involved the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that to be undue or unreasonable the preference or prejudice must relate or have reference to competing parties—producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic offered bear to each other, and to the carrier. When and so long as their relations are similar or "substantially" so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service. It thus appears that the intention of Congress as expressed in section, 1, 2, & 3, was to secure two leading objects, or effect two main purposes, viz, first, to establish and impress upon railroad
278 companies the duty of conforming to the general rule of the common law in making their charges for transportation services rendered reasonable and just, and second to prevent unjust inequality, 'artiality, favoritism, or unfairness, so far as concerned their charges for contemporaneous transportation services, as between persons, traffic or localities similarly circumstances. When the carrier's charges are in themselves unjust and unreasonable, the public is injuriously and unduly prejudiced and put at disadvantage, and the Commis'ion may in behalf of the public, when complaint is made by any one investigate such charges and order their correction, subject to the right of the carrier to a judicial determination of the question whether or not the charges are reasonable & just. When the qualified requirement of impartiality in charges as between persons, traffic, or localities similarly circumstances, is disregarded and violated by the carrier, the prejudice or disadvantage is personal or local, and the party or locality injured by the undue preference or the undue disadvantage, can alone make complaint or institute proceedings for its correction and for proper redress.

Now, it is neither claimed nor proved in the present case that defendant charges either for single personages or "party-rate" tickets are in themselves unjust and unreasonable. On the contrary, both rates are shown to be just and reasonable. The public has, therefore, no ground of complaint on that score, nor has any legitimate complaint been made in its behalf, either by the original petitioners or by the Commission.

Who is discriminated against by defendant's difference in charges for the party of ten or more and the single passenger? Who is given an un-

due preference or advantage or subjected to an undue prejudice or disadvantage by reason of said difference in rates? If any one, it is mani-
279 festly the single passenger. But no complaint of undue prejudice or disadvantage and of consequent personal injury comes from that quarter. When this court is called upon, either by the Commis'ion or others, to enforce the provisions of the act to regulate commerce, it is indispensibly necessary to show either a case of individual grievance or of public inconvenience resulting from or arising from acts of the carriers done in violation of the statute. The proceeding in this case is not based upon any individual injury, but rest upon the alleged inconvenience to and undue prejudice against that portion of the public represented by the single-passenger traffic, in being charged by defendant a somewhat higher rate per mile than it demands & receives of and from a party of ten or more purchasing a single ticket for the party. But how can this position be sustained, if, as we have already stated, both single passengers and "party rate" charges in use by defendant are, in themselves, "reasonable and just" toward each class of such traffic? When a carrier's charges are "reasonable and just" in compliance with the requirement of section 1, how can they be regarded or treated as constituting an unjust discrimination under section 2, or an undue preference or undue prejudice under section 3 of the act? The provisions of section 2 & 3 were certainly not intended to restrict or qualify the right conceded and the duty imposed by the first section of making charges "reasonable & just." In the case of "Attorney-General vs. The Birmingham & Derby Junction Ry. Co., cases 124, a railway company (where act contained an equality clause) charges a smaller fare to passengers who traveled from D to N, intending to proceed from N to London by another railway, than they charged passengers from D to N who had no such intention. On motion for an injunction, it was held by Lord Chancellor Cottenham that the equality clause was meant only to prevent the exercise of a monopoly to the prejudice of one passenger or carrier, and in favor of another, and that, even if he
280 had jurisdiction to interfere, he would not do so unless it was clear that the public interest required it; and, if being admitted in the case that the higher charge was not more than the act authorized, it did not appear that the public were prejudiced by the arrangement. In the present case, it being neither claimed nor shown that the higher charge of three cents per mile for the single passenger on a single ticket is unjust and unreasonable, or more than the defendant is authorized to charge by section 1, it is difficult to see in what respect the public is prejudiced or unjustly discriminated against by the arrangement.

But aside from this view of the subject, in what respect does the difference which defendant makes in the rate charged the single passenger and the party of ten or more traveling together on a single ticket conflict with the provisions of sections 2 and 3 of the act? Under the flexible and elastic rule prescribed by said sections, construed in the light of section 1, a difference in charges, while an element in the proper definition of unjust discrimination or undue preference, is by no means the sole or controlling factor. To come within the inhibition of said sections, the difference must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kind of traffic, under substantially the same circumstances and conditions. In respect to passenger

traffic the position of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantially identity of situation and of service, accompanied by inequality and partiality, resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination. The section substantially adopts the principle laid down in Hays vs. Penn. R. R. Co., 12 Fed. Rep., 369, where the court, after stating that a common carrier had no right to make unreasonable and unjust discrimination, said, "but what are such discrimi-
281 nations? No rule can be formulated with sufficient flexibility to apply to any case that may arise. It may, however, be said that it is only when the discrimination inured to the undue advantage of one man in consequence of some injustice inflicted on another that the law interferes for the protection of the latter." It can not be properly said in the case under consideration that the lower rate given to a party of ten or more confers upon such party an undue advantage in consequence of injustice inflicted upon the single passenger.

There is nothing competitive in the traffic of the single passenger and the party of ten or more which would make lower rates to the latter operate prejudicially to the former. It is well understood that the cost of transportation services to the carrier decreases as distance increases, as trips are multiplied, and as the number transported are enlarged. It costs the carrier less proportionately to transport a party of ten or more than it does to carry a single passenger. The carrier is entitled to a fair profit for its services, and when the profit derived from the larger number carried at reduced rates reasonably corresponds with that resulting from the carriage of an individual at a somewhat higher rate, what unjust discrimination is made, or in what respect is the individual subjected to undue prejudice and disadvantage? A single passenger desiring or proposing to make ten or more separate trips may procure a ticket for the designated number of trips at rates lower per mile than are charged the single passenger on a single trip ticket between the same points. Has it ever been held that this would operate to confer an undue disadvantage? A passenger on a through ticket from New York to Cincinnati travels at a lower rate per mile between Pittsburg & Cincinnati than is charged the passengers traveling only between said places. The two may travel in the same train and in the same car, but the difference in rates each is paying over the same distance is not unjust discrimination or undue
282 preference, because the service is not identical (Union Pacific Ry. Co. vs. U. S., 117, p. 355–363). But what is the real underlying principle which sanctions or justifies the difference in charges in such cases? It is that carriers may make reasonable concessions in the way of reduced rates in consideration of longer service and of more frequent trips. The reason and the principle equally applies to an adjustment of rates based upon numbers transported.

What difference or distinction is there between transporting a single passenger a given distance at reduced rates as compared with the single trip rate in consideration of his making ten or more trips and the transportation of ten or more persons traveling together on a single ticket over the same distance on one trip at the same reduced rate? There being no competitive relation between the single passenger and the party of ten or

more, the relative cost of service in their transportation being different, the profit derived from one fairly corresponding with received from the other, and the inducement on the part of the carrier for making the reduction in favor of "party-rate" being the development and maintainance of a class of traffic which the evidence shows can not and will not stand a higher rate than two cents per mile, we can not properly compare the single passenger with the party class of ten or more, nor find that the reduced charges allowed the latter constitute, under the circumstances, undue preference in favor of such parties or undue prejudice against the single individual. Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at common law, free to make special contracts looking to the increase of their
283 business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles, which are recognized as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services? In Nicholson vs. Great Western Ry. Co., Vol. I, Railway cases by Neville and Macnamara, p. 147, which included the undue preference clause of the act of 1854, Earle, C. J., said: "I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as free as any merchant, subject only (as to this court) to the duty of acting impartially without respect of persons, and their duty is performed when the offer of the contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district, but the power of the railway company to contract is not restricted by these considerations."

It will be seen from the examination of the English railway traffic acts of 1845 and 1854 that section 90 of the former and section 2 of the latter were substantially adopted and embodied in sections 2 and 3 of our act to regulate commerce. Section 90 of the English act of 1845 required that "tolls were at all times (to be) charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods carr*ages* of the same description, passing only over the same portion of the line of railroad under the same circumstances; and no reduction or allowance in any such tolls should be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway." Section 2 of the
284 act of 1854, after requiring every railway company subject to the law to afford all reasonable facilities, according to their respective powers, for receiving, forwarding and delivering of traffic, provided that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular persons or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person, or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The English cases upon the question of "undue preference," which have arisen under said sections, will be found to confirm the construction we have placed upon sections 2 and 3 of our act, and also show the elements which may properly be considered in determining whether "undue preference" has been given or "undue disadvantage" has been imposed. The history and bearing of the equality clause of the act of 1845 is elaborately described by Blackburn in the case of Great Western Ry. Co. vs. Sutton, L. R., 4 H. L., 238, 38 L. J., Ex. 177, with respect to the "undue preference" forbidden by section 2 of the act of 1854, which was a wise enlargement of section 90 of the act of 1845. The English cases stated generally hold that a preference to be "undue" must be preference of a person similarily circumstanced and bringing a similar profit to the company. In Hosier vs. Caledonian Ry. Co., Vol. I, N. & M. Railway cases, p. 30, where the passenger rate between certain stations was complained of as constituting undue preference, the lord president said: "It (the act) provides for giving undue preference to parties 'pari passu' in the matter, but you must bring them into competition in order to give them an interest to complain."

In Jones vs. The Eastern Counties Ry. Co., I., N. & M. Railway cases, p. 45, the undue preference complained of was a preference given
285 to the inhabitant of Harwick over those of Colchester in the matter of season tickets, lower rates being conceded to the former on longer distance than was allowed to the latter, but the court held that the difference did nor constitute a case of "undue preference" within the act.

In the cases of Painter vs. London, Brighton & South Co. Ry. Co., 2 C. B. N. S., 702, and Infracomb Co. P. C. vs. London S. W. Ry. Co., W. N., p. 289, it was said that regard must be had to the general conveniences of the public rather than to the wishes or interests of individuals, and that it must be clearly shown that the causes complained of occasioned some substantial injury or inconvenience to the public. In the case of Nansome vs. Eastern Counties Ry. Co. (No. 1), reported in 1 C. B. N. S., 437, 26 L., J. C., 891, Cresswell, J., in considering the meaning of the expressions "undue or unreasonable preferences or advantage" and "undue or unreasonable prejudice or disadvantage," says: Are these words to be construed with reference to the interests of the parties using the railway only, or may the interest of the railway be taken in any manner into consideration? Ex. qr. if 1,000 tons can be carried for a lower sum per ton per mile than 100 tons, yielding equal profit per ton to the railway company, may they so regulate the charges as to derive such equal profit? Would the lower rate charged for the larger quantity give an undue preference? If that may be done without giving what the statute calls an undue and unreasonable preference, may not the company, in fixing rates, consider the whole profit and not the mere profit per mile, and in order to induce people to carry more on their line and longer distances, agree to make a reduction in such cases? It is true that the sender of the smaller quantity for a shorter distance will pay more per mile and more per ton in the respective cases, but will that be an undue and unreasonable prejudice or disadvantage? After a good deal of consideration, we
286 think that the fair interest of the railway ought to be taken into the account, and then the questions suggested assume a very complicated and difficult character.

In Oxlade vs. North Eastern R'y Co., I. C. B. N. S., 454, 26 L. J. C. P., 129, it was held that a railway company was justified in carrying goods for one person at a less rate than at which they carried the same description of goods for another, if ther' were circumstances which rendered the cost to the company of carrying for the former less than the cost of carrying for the latter. In Nicholson et al. vs. The Great Western R'y Co., 5 C. B. N. S., 366, 28 L. J. C. P., 89, it was held to be competent for a railway company to enter into special agreements whereby advantages may be secured to individuals in the carriage of goods when it appeared that in entering into such agreements the company had only the interest of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages offered them as adequate, and the company was willing to afford the same facilities to all others upon the same terms. In Bills Dyke Coal Co. vs. The North British R'y Co., vol. 2, N. & M. R'y cases, p. 105–110, it was said by the court that a railway company pays no more than due regard to its own interest if it charges for its services in proportion to their necessary cost and has only such variation in its rates as there is in the circumstances of its custumors."

In Boxindale vs. Great Western R'y Co. (reading case), 5 C. B. N. S., 336, 28 L. J. C. P., 81, Cockburn, C. J., after statin' that, if it was made to appear that the disproportion (in rates) was not justified by the circumstances of the traffic, the court would interfere, proceeded as follows: "So, again, if an arrangement were made by a railway company whereby
287 persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantages were extended to all persons under the like circumstances, yet it would assur'dly insist on the latter condition," and while recognizing the duty on the part of the court to redress any injustice or inequality prohibited by law, he makes the further pertinent observation, "at the same time we must carefully avoid interfering, except where absolut'ly necessary for the above purpose, with the ordinary rights (subject to the above-named qualifications) which a railway company in common with any othe' company or individual possesses of regulating and managing their own affairs, either with regard to charges or accom'odations, or to the agreements and bargains it may make in it' particular business."

As regards the undue preference branch of the English acts, "the effect of the decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, from imposing such conditions as may incident'ly have the effect of favoring one class of travel, or one town, or one portion of their traffic, provided the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company. (Report of Amalgamation Committee of 1872, p. 13 n.) Our act to regulate commerce having adopted substantially sections 2 and 90 of the English railway traffic acts of 1854 & 1845, the settled construction which the English courts had given to their terms and provisions must be received or incorporated into our statute. (McDonald vs. Henry, 110 W.

S., p. 619.) The English case referred to also & others that might
288 be cited to establish the rule that in passing upon the question of undue preference or disadvantage it is not only legitimate but proper to take into consideration, besides the mere difference in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as competitive or otherwise. The English decisions cited and the case of Denaby Main Colling Co. vs. Manchester S. & L. Ry. Co., II app. case, p. 97, 55 L. J. Q. B., 181, further establishes the burden of proving the undue preference or the undue prejudice rests upon the complaining party. In the latter case Earl of Selburn, after referring to the objection that it was not shown by the carrier that the reduced rates corresponded with the reduced cost to the company, said: "I do not find in the act that when there is a real difference of circumstances, and nothing to show any want of good faith, the burden of justifying the exact difference of charge (or what is the same thing, the deduction or allowance) by showing a numerical or necessary relation between it and the actual saving in cost upon the company." Section 27 of the act of August 10th, 1888 (51 & 52 Vict., ch. 25), for the better regulation of railway and canal traffic, changed this rule by providing that where inequalities in rates exist "the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie in the railway company. As no such provision is found in our act the burden of showing that the difference in defendant's party and single passenger rates constitutes undue preference in favor of the former, or undue prejudice or disadvantage against the latter, devolves upon the complainant and must be established as the reasonable and legitimate result of the various elements or con-
289 siderations above mentioned. There is no pretense or suggestion that there is any want of good faith in defendant's action or that the difference in rates complained of was made or is continued with a view to any actual disadvantage of the single passengers or to subject the public to any inconvenience or injury.

Subjecting defendant's rates for single passengers and for parties of ten or more traveling together on the single ticket to the test of various considerations, indicated above by the English decisions as elements in the question, does it clearly appear that such rates are so adjusted as to give an undue or unreasonable prejudice or disadvantage upon the other class? We think not. In view of the established facts, that it is not claimed or not shown that the single-passenger rates are unjust or unreasonable; that the "party rate" are just and reasonable; that there is no competition or competitive relation between the two classes; that the "party rate," open to all who chose to avail themselves of the same, are a convenience and benefit to a considerable portion of the traveling public; that the interests of the carrier are reasonably promoted by their use; that the cost of service is relatively or proportionately less for the party of ten or more than for the single passenger, and that the difference in charges does not appear to be improperly adjusted with reference to or unjustified by the actual saving or profit to the company, it can not properly be said that the traffic is of like kind and that the service is identical or under substantially the same circumstances and conditions."

The decisions of the State courts on the subject of unjust discriminations and the considerations that may be properly referred to in passing upon the question are, we think, in harmony with the views above expressed and the conclusion reached. (See Reagan vs. Aiken, 9 Lea, Tenn., Rep. 609. Schofield vs. Lake Shore & M. S. R. Co., 43 Ohio, st. 571. Johnson vs. Pensacola & P. R. Co., 16 Fla., 623. McDuffie vs. Portland R. R. Co., 52 N. H., p. 430. Kilman vs. N. Y. Central & H. R.
290 R. Co., 100 N. Y. 395 Shipper vs. Pa. R. Co., 47 Pa. Rep., 338. Christie vs. Mo. Pac. R. Co., 94 Mo. Rep., 453. Bayles vs. Kansas Pac. Ry. Co. (submit of Colorado) reported in Langus Reports, annotated book 5, p. 480, and Root vs. Long Island R. Co. (N. Y.), reported in vol. 4 Lawyers' N. P., pp. 331.

We think there is no force in the suggestion that "party rate" tickets, as used by the defendants, are more liable to abuse the ordinary or regular single-passenger ticket. In the present case it is clearly shown by the evidence of railroad superintendents, and experts familiar with the subject, that such "party rate" tickets are less liable to abuse than ordinary single tickets. It is manifest from a moment's reflection that the fewer the tickets on which the carrier's transportation services are arranged and conducted the better it can protect itself and the public against speculators and ticket brokers. It is also manifest that the larger the number of passengers embraced in a single ticket the greater will be the difficulty of "scalpers" or ticket brokers dealing therein. But if the single tickets for parties of ten or more traveling together were liable to the above suggested, that fact would hardly control the proper construction of the law, nor tend to establish that their issuance at reduced rates constituted undue preference or advantage on the other.

Our conclusion upon the whole case that "party rate" ticket as used by defendant are not in contravention of section 2 & 3 of the act to regulate commerce, and that the order of the Commission requiring and enjoining the defendant to cease and discontinue the use of such tickets is not lawful and should not be enforced by this cou't. It follows that the complainant's bill should be dismissed with costs to be taxed. It is accordingly so ordered and adjudged.

HOWELL E. JACKSON,
Circuit Judge.

291 And afterwards, to wit: On the 23rd day of August, A. D. 1890, the following "entry" was made on the journal of the court above-named, clothed in the words and figures as follows:

(Entry z, 113.)

Circuit court of the United States, western division, southern district of Ohio.

THE INTERSTATE COMMISSION
vs.
THE BALTIMORE AND OHIO R. R. } Decree.

This cause having come on to be heard upon the bill of complaint herein, the answer of the respondents and the proof, documentary and

written, taken and filed in said cause, and having been agreed by counsel for the respective parties:

Now, therefore, in consideration thereof it is ordered, adjudged, and decreed, and the court doth order and decree that the complainants' said bill of complaint be and the same is dismissed with costs to the defendant, to be taxed, to which ruling, order, and decree of the court complainant, by its counsel, excepts, in open court, and prays that an appeal to the Supreme Court of the United States may be granted, which is accordingly done.

292 THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF OHIO,
Western Division, ss:

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the district and division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause wherein the Interstate Commerce Commission was complainant, and the Baltimore and Ohio Railroad Company defendant, as the same appears of record and on file in the clerk's office of said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, O., this 1st day October, A. D. 1890.

[SEAL.] B. R. COWEN,
Clerk,
By R. O. GEORGE,
Deputy.

293 (Indorsed on cover:) No. 1438. The Interstate Commerce Commission, appellant, *vs.* The Baltimore and Ohio Railroad Company. S. Ohio, C. C. U. S. Filed October 17, 1890.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1891.

THE INTERSTATE COMMERCE COMMISSION (*Appellant*)
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY (*Appellee*). } No. ——.

Stipulation.

It is hereby stipulated and agreed that the printed record in the above-entitled case is to be amended as follows:

Page 28, line 10, strike out the italicized "or."
Page 28, line 14, for "tote" read "total."
Page 28, line 37, strike out words "by the party."
Page 29, line 19, strike out the question and insert in lieu thereof:

"Q. This practice which you have described in your last answer, was that in vogue before the passage of the interstate-commerce law, was it not?"

Page 31, line 3, strike out word "rates" and insert "rate."
Page 32, line 4 from bottom, for "more" read "move."
Page 33, line 18, strike out word "upon."
Page 33, line 34, for "in" read "and."
Page 34, line 26, strike out the question and insert:

"Q. These tickets you have described were good in the hands of the bearer, were they not?"

Page 40, line 2 from bottom, for "is" read "if."
Page 42, line 12, after "A." insert "No, sir."
Page 59, line 28, for "overstate" read "overstated."
Page 60, line 34, for "they" read "you."
Page 66, line 38, for "No, sir" read "Yes, sir."
Page 71, line 32, make signature, "O. P. McCarty."
Page 88, line 33, insert "A. Yes, sir."
Page 103, line 7 from bottom, insert "by" after "mean."
Page 106, line 1, strike out "ticket," middle of line.
Page 112, line 21, for "whatever" read "wherever."
Page 112, line 29, for "influence and" read "influence of."

Page 113, line 26, insert:

"A. When we made use of the party-rate tickets we did not include them in the designation of commutation tickets.

"Q. And that was true at the time of the passage of the interstate-commerce law?"

Page 113, line 28, strike out "that."

Page 7, line 16 from bottom, for "as" read "are."

Page 7, line 15 from bottom, for "12nd" read "22nd."

Page 9, line 4 from bottom, strike out "that" and insert "the act."

Page 23, line 32, for "proceeding" read "preceding."

It is further stipulated and agreed that to the original answer of the Baltimore and Ohio Railroad Company filed in the court below there was attached an affidavit, in the form set forth at the bottom of page 25 of the Record, duly sworn to and subscribed by Charles K. Lord, third vice-president of said company, before a proper officer and duly attested.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Counsel for the Baltimore and Ohio R. R. Co.
A. G. SAFFORD,
Solicitor for Interstate Commerce Commission.

Office Supreme Court U. S.
FILED.
JAN 26 1892
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890. **No. 1438.**

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

OPINION OF JUDGE JACKSON

IN THE COURT BELOW,

The opinion is filed separately because of the imperfections in it as printed in the Record.

THE INTER-STATE COMMERCE COMMISSION

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

United States Circuit Court,

SOUTHERN DISTRICT OF OHIO,

Western Division.

In Equity. No. 4336.

OPINION OF JUDGE JACKSON.

This is an application, or proceeding, by the Inter-State Commerce Commission, under the provision of the Inter-State Commerce Act, for the issuance by this Court of a Writ of Injunction, or other process, mandatory or otherwise, to restrain the Baltimore & Ohio Railroad Company from further continuing in its violation of certain orders of the Commission, and for a decree requiring said Railroad Company to pay such sum of money, not exceeding the sum of $500, for every day after a day to be named in the decree that said defendant shall fail to obey said injunction, or other proper process.

The orders of the Commission which this Court is asked to enforce by its injuction, or mandatory process, were made upon a complaint filed before the Inter-State Commerce Commission by the Pittsburgh, Cincinnati and St. Louis Railway Company against The Baltimore & Ohio Railroad Company. That complaint set forth and alleged that the petitioner was duly incorporated under the laws of Pennsylvania, West Virginia and Ohio, and was engaged as a common carrier in operating a system of railroads extending from Pittsburgh, Pa., to various towns

and cities in said States; that the Baltimore & Ohio Railroad Company was duly incorporated under the laws of the State of Maryland, and was also a common carrier, operating a system of railroads, a part of which extended from said city of Pittsburgh to many of the important towns and cities in the above named States, which were reached by petitioner's lines of road, and thus made it a competitor of petitioner in respect to business between said points; that upon its lines of road on which business in competition with that of petitioner was transacted, The Baltimore & Ohio Railroad Company had put into effect, and had then in operation, so-called "party rates," whereby parties of ten or more persons travelling on one ticket were transported over said lines of road, between stations located thereon, at *two cents* per mile "per capita," which was less than the rate for a single person, the rate for a single passenger being about three cents per mile; that said Baltimore & Ohio Railroad Company was also in the habit of selling round-trip excursion tickets, good between points on its lines of railway, at less than rates charged for ordinary tickets, without publicly posting in its ticket offices, or elsewhere, the rates at which said excursion tickets were sold; that the issuance of said "party-rate" tickets, and the selling of excursion tickets without posting the rates therefor, were in violation of the Inter-State Commerce Act, in petitioner's judgment, and for that reason it had declined to place the same in effect upon its lines; that by reason of said "party rates" and *excursion rates* so allowed and issued by said Baltimore & Ohio Railroad Company, traffic was diverted from petitioner's lines to those of the Baltimore & Ohio Company, and that petitioner was greatly damaged by loss of revenue thereby. Wherefore petitioner prayed that the Baltimore & Ohio Railroad Company should be required, by an order of the Commission, to

withdraw from its lines of road on which business in competition with that of petitioner was transacted said "party rates," and to decline to give such rates in future; and also requiring said Company to discontinue the practice of selling excursion tickets at less than the regular rate, unless the rates for such tickets were posted in its offices. The Baltimore & Ohio Railroad Company answered said complaint, admitting the corporate character and business of the two companies, as stated in the petition, admitting that it had and did sell, on or between special dates, round-trip excursion tickets at less rates than those charged for ordinary tickets, without posting notice of the same in its ticket offices, except by way of advertisement. It claimed that said excursion tickets so sold were such "excursion tickets" as are mentioned in the 22nd Section of the Act to Regulate Commerce, which the Act did not require should be posted, and which it would be practically useless, if not impossible, to post; but that defendant published such rates through the usual means employed by all other railroad companies, as by newspaper advertisements, hand bills, etc.

The defendant admitted that it had issued the so-called "party rates," which it claimed were in no way a violation of the Act to Regulate Commerce, but on the contrary were an accommodation to the public, necessary to the business of theatrical or amusement companies and others travelling together in a large body. The defendant also denied that the petitioner had any right to institute said proceedings before the Commission, and averred that petitioner was not such a complainant as the Act to Regulate Commerce authorized to make complaint, its alleged injury from defendant's acts arising or resulting to it only as a competing carrier; and defendant moved to dismiss the petition on that ground, and because petitioner did not allege facts sufficient to bring

it within any of the classes of persons, firms, corporations or associations that could properly institute such proceedings. This motion was either not insisted upon, or was denied, as the Commission proceeded to hear and consider the complaint, and on February 21, 1890, filed its report in the premises, holding—

1st. That passenger excursion rates are required to be published according to the provisions of Section 6 of the Act to Regulate Commerce, and that the practice of the Baltimore & Ohio Railroad Company of selling round-trip excursion tickets at less than rates charged for ordinary tickets, without publicly posting in its ticket offices the rates at which such excursion tickets were sold, was in violation of the law; and

2nd. That "party-rate" tickets are not commutation tickets, within the true meaning of Section 22 of the Act, and when party rates to ten or more persons travelling together on a single ticket are lower than contemporaneous rates for single passengers, they constitute discrimination, and are illegal. It was thereupon ordered and adjudged by the Commission—

First. That the Baltimore & Ohio Railroad Company "be, and it is hereby required to print, post and file schedules showing the rates, fares and charges now or hereafter established by it for *round-trip* passenger excursion tickets between points on its lines, or between points on its lines and points on the lines of other common carriers with whom it joins, or hereafter may join, in establishing rates, fares and charges therefor, in conformity with the provisions of Section 6 of the Act to Regulate Commerce;" and

Secondly. "That the Baltimore & Ohio Railroad Company do forthwith wholly and immediately cease and desist from charging rates for transportation over its lines of a number of persons travelling together in one

party, which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect, for the transportation of single passengers between the same points."

Notice embodying said orders, together with a copy of the Commission's Report and Opinion, was duly sent to and received by the defendant.

Thereafter, on May 1, 1890, the Inter-State Commerce Commission filed its petition or bill in this Court against the Baltimore & Ohio Railroad Company, setting forth the foregoing proceedings before and orders made by the Commission, and charging that the defendant, since the issuance and service upon it of said orders, had wholly disregarded and set at naught the authority and commands of the Commission; that it had neglected and refused, and still neglected and refused, to furnish the Commission, and to print, post and file schedules showing the rates, fares and charges established by it for round-trip passenger excursion tickets, as required by law, and as in and by the order of the Commission it was enjoined and required to do; and further, that defendant had not ceased and desisted from charging rates for the transportation over its lines of a number of persons travelling together in one party on a single ticket, which were less for each person of such party than rates contemporaneously charged by it under schedules lawfully in effect for the transportation of single passengers between the same points, as in and by said order of the Commission it was required to cease from doing. After setting out various instances in which the defendant had, since the promulgation of said order, issued such "party-rate" tickets, the petition or bill invokes the aid of this Court to compel obedience on the part of the defendant to the requirements of said orders, and to punish it, as prescribed by the statute, for its continued disregard thereof.

The defendant duly entered its appearance and filed its answer. After admitting the proceedings before the Commission, which resulted in the foregoing orders, the defendant denied that it had failed and neglected, since the issuance thereof, to furnish to the Commission and to print, post and file schedules showing the rates fixed and charges established by it for *round-trip passenger excursion tickets* issued by it, as required by law, or even as required in and by the said order of the Commission. It admitted that it had not ceased and desisted from charging rates for transportation over its lines for a number of passengers travelling together in one party upon one ticket, which were less for each person of such party of ten or more than rates contemporaneously charged by it for transportation of single passenger between the same points. The particular instances of the issuance by it of such "party-rate" tickets set out in the bill were admitted to be substantially true. Respondent, however, denies that said "party-rate" tickets for ten or more persons travelling together as one party constitute any unjust discrimination, or are in violation of the law, and insists that in so far as said order of the Commission enjoins and requires it to desist from the issuance of such "party-rate" tickets at less rates than are contemporaneously charged for single passengers between the same places, it is illegal; that respondent has not complied, and should not be required to comply therewith, because it rests upon an improper finding that said "part-rate" tickets are not "commutation passenger tickets," within the true meaning of Section 22 of said Act to Regulate Commerce, because it is based upon an erroneous construction of said Act, and because it was beyond the power of the Commission to make it.

After referring to the general practice on the part of railroads, before the passage of the Act to Regulate Com-

merce, of issuing special rate passenger tickets of various kinds and forms—such as mileage, excursion, party, monthly or quarterly, a specified number of trips for one person, or one trip by the specified number of persons, and ten, twenty or thirty-trip tickets—at rates lower than the regular single fare charges, based upon the principle that when the amount of travel thereby encouraged or developed would more than make up to the carrier for the reduction of the *per capita* rate, then such special rate was reasonable and just in the interests of both the carrier and the public, the respondent proceeds to state "that since the passage of said Act to Regulate Commerce this respondent has continued as theretofore the practice above stated, of making a lower charge on passenger travel, in consideration of the amount and frequency of travel, and with that purpose and to accommodate the various classes of passengers, it has continued in use all the forms of ticket described in the next preceding section; that the charge fixed by it for the transportation of parties of ten or more on a single ticket has been two cents per mile *per capita*, which is the same rate charged on thousand mile tickets, and is a higher rate than it charges on long-distance passenger travel and excursionists, and higher than its general rates for suburban travel on time or other suburban tickets. That the said charge for the transportation of parties on a single ticket is just and reasonable, affording a fair compensation to the carrier, and for the best interests both of the carriers and of the public, because any higher rate would destroy the business. That the business reasons, circumstances and conditions, which induce respondent to make such lower charge for the transportation of parties as aforesaid, and that make it the interest of this respondent as a carrier to make such lower charge, are precisely the same reasons, circumstances and conditions that induce it, and make it its interest to fix

a lower charge for transportation of passengers buying mileage tickets, time or trip tickets and excursionists. That while so-called "party-rate" tickets are used principally by travelling amusement companies, because no other form of ticket meets the requirements of such companies, yet this respondent has avoided confining such tickets to any class of business, by offering them on the same terms to the public at large. That this respondent has obviated the danger that such lower charge for parties might be taken advantage of by speculators or ticket-brokers, by issuing only one ticket for the whole party. And respondent avers that as such tickets are now issued by it, they are not and cannot be used for speculative purposes, and afford no opportunity for evading the law in the hands of ticket-brokers. This respondent further avers that it may rightly and legally make a charge *per capita* for persons travelling on said party-rate tickets lower than its charge for a single passenger making one trip between the same points, the character, circumstances and conditions of the service being substantially different, and that the making of such lower charge *per capita* to the members of the party makes or gives no undue or unreasonable preference or advantage to them, and subjects no person, company, firm, corporation or locality, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever."

The charge that defendant had neglected and refused to print and post its rates for round-trip excursion tickets after the issuance and service of the Commission's order, was denied by respondent, was unsustained by proof, and was practically abandoned at the hearing. It is, therefore, unnecessary for the Court to express any decided opinion upon the question, as to which we have considerable doubt, whether a railroad company's rates on mileage, excursion, or commutation passenger tickets, or

other special rates allowed by Section 22 of the Act to Regulate Commerce, are required to be printed and posted in its offices, and furnished the Commission in conformity with Section 6 of said Act. Under Section 22 of the Act as originally passed it was declared "that nothing in this Act (including Section 6), shall apply to the issuance of mileage, excursion, or commutation passenger tickets." The section as amended by the Act of March 2, 1889, provides "that nothing in this Act shall prevent the issuance of mileage, excursion or commutation passenger tickets." How far this change of phraseology operates to bring such tickets within the provisions of Section 6 of the statute, so as to require railroad companies to post their rates for such tickets, is by no means free from difficulty and doubt. But as the determination of the point is not necessary to a decision of the case before us, we do not deem it proper to pass upon it.

The real controversy in this case is confined to the validity of the Commission's order requiring the defendant to desist from the issuance of "party-rate" tickets for ten or more persons travelling together on one ticket at a lower rate per mile and per capita than is contemporaneously charged for a single passenger between the same stations. This issue presents two leading and important questions, which involve the proper construction of Sections 1, 2, 3 and 22 of the Act to Regulate Commerce, under the facts established by the pleadings and evidence:

First. Are the "party-rate tickets" in use by the defendant embraced or included in the general designation of "commutation passenger tickets," which Section 22 as amended by the Act of March 2nd, 1889, does not "prevent" the railroad company from issuing? and

Second. If such "party-rate tickets" are not "commutation passenger tickets," within the true meaning of said Section, do they constitute either an unjust discrimina-

tion as defined and prohibited by Section 2, or an undue or unreasonable preference or advantage as forbidden by Section 3 of said Act?

The last clause of Section 1 of the Act to Regulate Commerce adopted and established for the United States, in respect to inter-State traffic, the general rule of the Common Law, that all charges made by common carriers, subject to the provisions of said Act, for any service rendered in the transportation of passengers or property, should be "reasonable and just," and that every "unjust and unreasonable" charge for such service should be prohibited and declared unlawful. No claim is made that defendant's charges for parties of ten or more or for single passengers have violated the provisions of said section. The report and opinion of the Commission does not find that the rates in use by defendant, for either "party-rate" or single-passenger tickets, are in any way unjust or unreasonable charges for the services rendered in transporting either class, and the proof before this Court establishes that said "party-rates" of two cents per mile are reasonable and just; that they are promotive of the interests of the railway companies issuing them, and a convenience to the public.

The right of the defendant to make and collect reasonable charges for its transportation service is a property right under its franchises, of which it cannot be deprived without due process of law. This is settled by the recent decision of the Supreme Court in the case of The Chicago Milwaukee and St. Paul R'y Co. v. The State of Minnesota.

In considering the foregoing questions on which the proper determination of the present case rests, the fact established by the proof, and not controverted by or on behalf of complainant, that defendant's charges for both the single passenger and the party of ten or more

are reasonable and just in themselves, should be kept in view.

Do "party-rate" tickets come fairly within the letter and spirit of the general term "commutation passenger tickets" as used in Section 22 of the statute? Railroad experts, many of whom were examined in this case, differ considerably when they undertake to give an exact technical definition of the words "commutation passenger tickets." Their testimony, however, shows that prior to the passage of the Inter-State Commerce Act, railroad companies were in the constant habit of issuing a variety of special-rate tickets—such as mileage, excursion, monthly or quarterly, family, school-children, twenty or fifty trips (good for the specified number of trips by one person or for one trip by the specified number of persons), round-trip and party-tickets for ten or more persons travelling together on a single ticket, either one way or for the round-trip—and that all these different classes and forms of tickets come within the designation or general description of "commutation tickets" or "commutation rates." This prevailing practice of the common carriers before the passage of the Act, which has been continued by many, if not by most of them, since the Act went into effect, may properly be looked to in placing an interpretation upon the words "commutation-passenger tickets" which follow, and were manifestly intended to enlarge the special classes covered by the "mileage" and "excursion" passenger tickets. After enumerating two varieties of special-rate tickets, under the heads of "mileage" and "excursion," which come within the commutation principle, the language is broadened by the addition of the general terms "or commutation passenger tickets," thereby clearly indicating an intention on the part of Congress to allow or not to prevent the continuance of the general practice of common carriers to adapt their rates and charges to meet

the wants and convenience of the different classes of the community, while developing and enlarging their traffic. The proof before the Court fails to show that mileage and excursion tickets differ in any essential particular from "commutation-passenger tickets" so as to make them a different class of tickets from the latter. On the contrary the evidence establishes that they are particulars of the general class covered by the more comprehensive term "commutation tickets" or fares, which we think defendant's witness, Wm. B. Shattuc, has most correctly and properly defined in saying that "a commutation ticket is a ticket for one passenger, good for more than one ride, or for more than one passenger for one ride, sold at a reduced rate." When therefore, the particular classes of tickets (mileage and excursion) falling within the commutation principle, are followed by the general terms "or commutation passenger tickets," this latter clause of the sentence, upon no sound rule of construction, should be taken or treated as presenting something in contrast with, or differing in character from the previously enumerated particulars, but should rather be regarded and interpreted as enlarging such particulars, so as to make the statute cover the whole subject of commutation tickets or rates in all their variety of forms and classes, as were then in use by common carriers subject to the Act; provided only that such charges were reasonable and just. It is clearly shown by the proof that the same business reasons, considerations, circumstances and conditions which induce the most enlightened railroad management, having due regard both to the interests of their lines and to the convenience of the public, to make reduced rates on mileage, excursion, long-distance, round-trip, time-trip or a specified-number-of-trip tickets, apply in all their force to "party-rate" tickets for ten or more persons travelling together in one body on a single ticket. Reduced rates

to those several classes or descriptions of passenger traffic rest upon the same general principle, which the Act to Regulate Commerce nowhere calls in question, that common carriers may rightfully so adjust their charges as to encourage and develope travel; that the amount or volume of such traffic is a legitimate element to be considered in determining what reduction should be made over the local or ordinary rate, so as to make both correspond with cost of service and the fair profit which the carrier is entitled to earn from each class of travel. Quantity of traffic affects both the cost of service and the legitimate profit which may be demanded for such service. When the profit on frequency of trips or on larger numbers transported at reduced rate, reasonably corresponds with the fair profit of the carrier on a single trip or smaller number transported at the ordinary higher rate, the carrier making such an adjustment of its charges with a view of encouraging and developing its legitimate business is only putting into practice the reasonable and well settled business principles of every avocation or trade, which recognize quantity, whether arising from the number or size of the transactions, as a proper element in the consideration and adjustment of the price. No complaint was ever made against common carriers acting upon this principle. The complaint made against them, and which the Act to Regulate Commerce sought to remedy and correct, was the practice of showing favoritism and partiality between their customers or localities under the same or substantially the same circumstances and conditions.

The Act to Regulate Commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience

of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no due or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the Act does not and was not intended to restrict the common law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the Act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates based on increased quantity or amount of service. No case arising under the English Railway Acts of 1845, 1854 and 1873, so far as we have been able to find after careful examination, has ever called in question or impeached the right of carriers to fix rates and issue tickets based upon the consideration of the amount or volume of the traffic, nor disputed the reasonableness and sound business propriety of railroad companies granting reduced rates to parties travelling often, or furnishing increased traffic in the way of numbers. On the contrary their right so to regulate and adjust their rates is universally recognized. While the English Statutes relating to railway traffic embody the same general principles, and seek to accomplish the same leading objects as our Act to Regulate Commerce, they contain no such affirmative provision or delaration, as that found in Section 22, excluding from the operation of the law the enumerated general and particular cases in which special rates were not intended to be prevented or interfered

with. Said Section 22 should be regarded as a legislative declaration that not merely mileage and excursion tickets, but passenger tickets generally based upon the commutation principle of conceding a reasonable deduction from regular local rates in consideration of the frequency or quantity of the traffic, if reasonable and just in their rates, did not come within the evils so to be remedied. To contend that a "party-rate" ticket to ten or more persons travelling together on a single ticket at reduced rates per mile does not come within the reason or principle of commutation tickets which are generally issued for only one way, because generally needed for only one direction, while admitting, as counsel for complainant does, that a round-trip ticket for ten or more persons travelling together at the same reduced rate would be considered as coming within the meaning of a commutation ticket, as explained by complainant's expert witnesses, is drawing a distinction without any substantial difference. It rests upon no reasoning, involves no public policy or convenience, and is altogether too narrow and refined to suppose that Congress intended to make any such nice discriminations in the language employed to express in a general way what the Law was intended *not* to *prevent*.

The Commission seem to have treated and construed Section 22 as designating certain cases and instances of discrimination which are to be considered as exceptions, and which, but for being so excepted, would fall within the operations of Sections 2 and 3 of the Act; and to have held that because "party-rate" tickets are not specially and particularly named, they should be excluded from the list of exceptions. We cannot, in view of the whole scope and manifest purpose of the Act, assent to this construction of Section 22. It should be given a broader and more liberal interpretation for the reasons already stated; and we think that, as thus interpreted, the section fairly

recognizes, in respect to passenger traffic, the general principle of commutation, and that "party-rate" tickets for ten or more persons travelling together in one body on one ticket at reduced rates per mile, which are reasonable and just, as issued by defendant, are within the letter and spirit of "commutation passenger tickets" as those terms are employed in the statute. This construction of the section neither disregards the duties and obligations of the carrier to the public, nor ignores its just rights in the reasonable management of its business. The evidence before us shows that if "party-rate" tickets, as described and used by defendant, cannot be lawfully issued, or should be discontinued, the revenues of common carriers derived from passenger traffic will be seriously impaired, while the convenience and benefit to the public travelling in parties or bodies of ten or more, such as amusement companies, associations, clubs, organizations, delegates and representatives attending conventions (religious, educational or political), will at the same time be greatly interrupted and prejudiced.

Our conclusion on the first question presented is that the "party-rate" tickets as used by defendant are "commutation passenger tickets," within the true meaning of Section 22 of the Act to Regulate Commerce.

Second. But suppose it be assumed that the defendant's "party-rate" tickets are not commutation tickets, as ruled by the Commission, then the question remains whether they constitute an unjust discrimination, as defined by Section 2, or an undue or unreasonable preference or advantage to, or any undue or unreasonable prejudice or disadvantage against any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever?

The evidence discloses that originally "party-rate" tickets were issued only to theatrical or amusement com-

panies, just as mileage tickets were to commercial travellers only; that since the passage of the Inter-State Commerce Act said "party-rate" tickets are no longer confined to one class of passenger traffic, but like mileage, time-trip and excursion rates, are regularly scheduled and posted and offered to the public at large, so that any and all parties of ten or more travelling together, who choose to apply for the same, have equal rights and privileges of securing such tickets at the same reduced rates.

Does this concession to the public travelling in parties of ten or more, open indiscriminitely to all persons of the requisite number who choose to avail themselves of the reduced rate by applying for a single ticket for the party, violate in letter or spirit the provisions of either Section 2 or 3 of the Act? In other words, may the defendant lawfully transport a party of ten or more persons on a single ticket at a less rate per mile and *per capita* than it charges for carrying a single passenger between the same stations? Does the fact that defendant charges the single passenger for a single trip the somewhat higher rate per mile than it charges for transporting ten or more passengers as one party on a single ticket over the same distance, constitute unjust discrimination as defined in Section 2, or undue or unreasonable preference or advantage in favor of such party of ten or more, or any undue or unreasonable prejudice or disadvantage against the single passenger, as prohibited by Section 3 of the Act? The decision of this question involves the proper construction and interpretation of said sections, which must be read and considered in connection with the provisions found in Sections 1 and 22, in order to arrive at their true scope and meaning. When thus considered, it is perfectly manifest that Congress did not intend to impose upon common carriers, subject to the

provisions of the Act, any rule or duty of absolute equality of rates in their charges for transportation services. Subject to the requirement of Section 1, that all charges made for any service rendered in the transportation of passengers or property shall be reasonable and just, the language of Section 2 clearly recognizes and implies that there may be discriminations which are not unjust and not prohibited. So too the language employed in Section 3, declaring it unlawful to make or give any "undue or unreasonable preference or advantage to any particular person, etc., or to subject the same to any "undue or unreasonable prejudice or disadvantage," clearly implies that there may be a preference or advantage on the one hand, or a prejudice or disadvantage on the other, which is not undue or unreasonable, and therefore not in contravention of the law. To be within the statute the discrimination must be "unjust," and the preference or prejudice must be "undue" or "unreasonable." The discrimination which is declared "unjust" is the charging and collecting, directly or indirectly, from any person or persons, a greater or less compensation for any service rendered in transporting passengers or property than is charged, collected or received by the carrier from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of like traffic "under substantially similar circumstances and conditions." When the traffic is not of like kind, or when the service is not "like and contemporaneous," or when the transportation is not rendered "under substantially similar circumstances and conditions," differences in charges do not constitute "unjust discrimination." The evil which said sections intended to remedy was the prevailing practice of railroad companies of favoring or showing partiality in the matter of charges to one person, firm, company or locality as against another person.

firm, company or locality, for like and contemporaneous services rendered under the same or substantially the same circumstances and conditions. Said sections were intended to prohibit favoritism and partiality in traffic rates, where the circumstances and conditions were substantially similar and the services contemporaneous. Persons in like situations requiring or desiring like and contemporaneous service on the part of carriers, were to be treated in the matter of rates impartially. This is expressed both affirmatively and negatively in the language of Section 3. The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company or traffic, nor subject any particular person, company or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that to be undue or unreasonable the preference or prejudice must relate, have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference, or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier. When and so long as their relations are similar or "substantially" so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service. It thus appears that the intention of Congress, as expressed in sections 1, 2 and 3, was to secure two leading objects, or effect two main purposes, viz.: First, to establish and impose upon railroad companies engaged in inter-State commerce, the duty of

conforming to the general rule of the Common Law in making their charges for transportation services rendered reasonable and just; and, second, to prevent unjust inequality, partiality, favoritism or unfairness, so far as concerned their charges for contemporaneous transportation services, as between persons, traffic or localities similarly circumstanced.

When the carrier's charges are in themselves unjust and unreasonable, the public is injuriously and unduly prejudiced and put at disadvantage, and the Commission may, on behalf of the public upon complaint made by any one, investigate such charges and order their correction, subject to the right of the carrier to a judicial determination of the question whether or not its charges are reasonable and just.

When the qualified requirement of impartiality in charges as between persons, traffic or localities similarly circumstanced is disregarded or violated by the carrier, the prejudice or disadvantage is personal, or local, and the party or locality injured by the undue preference, or the undue disadvantage, can alone make complaint or institute proceedings for its correction and for proper redress.

Now it is neither claimed nor proved in the present case that defendant's charges, either for single-passenger or "party-rate" tickets, are in themselves unjust or unreasonable. On the contrary both rates are shown to be just and reasonable. The public has therefore no ground of complaint on that score; nor has any legitimate complaint been made on its behalf, either by the original petitioner or by the Commission.

Who is unjustly discriminated against by defendant's difference in charges for the party of ten or more and for the single passenger?

Who is given an undue preference or advantage, or subjected to an undue prejudice or disadvantage by reason of said difference in rates? If any one, it is manifestly the single passenger. But no complaint of undue prejudice or disadvantage and of consequent personal injury comes from that quarter. When this Court is called upon either by the Commission or others to enforce the provisions of the Act to Regulate Commerce, it is indispensably necessary to show a case either of individual grievance or of public inconvenience, resulting or arising from acts of the carrier done in violation of the statute. The proceeding in this case is not based upon any individual injury, but rests upon the alleged inconvenience to and undue prejudice against that portion of the public represented by the single-passenger traffic, in being charged by defendant a somewhat higher rate per mile than it demands and receives of and from a party of ten or more purchasing a single ticket for the party. But how can this position be sustained, if as we have already stated, both single-passenger and "party-rate" charges in use by defendant are in themselves "reasonable and just" towards each class of traffic? When a carrier's charges are "reasonable and just," in compliance with the requirement of Section 1, how can they be regarded or treated as constituting an unjust discrimination under Section 2, or an undue preference or undue prejudice under Section 3 of the Act? The provisions of Sections 2 and 3 were certainly not intended to restrict or qualify the rights conceded and the duty imposed by the first section, of making charges "reasonable and just."

In the case of Attorney-General v. The Birmingham and Derby Junction Ry. Co., 2 Ry. Cases, 124, a railway company (whose act contained an equality clause) charged a smaller fare to passengers who travelled from D—— to N——, intending to proceed from N—— to Lon-

don by another railway, than they charged passengers from D—— to N—— who had no such intention. On motion for an injunction it was held by Lord Chancellor Cottenham, that the equality clause was meant only to prevent the exercise of a monopoly to the prejudice of one passenger or carrier and in favor of another, and that even if he had jurisdiction to interfere, he would not do so unless it was clear that the public interest required it; and it being admitted in the case that the higher charge was not more than the act authorized, it did not appear that the public were prejudiced by the arrangement.

In the present case, it being neither claimed nor shown that the higher charge of three cents per mile for the single passenger on a single-trip ticket is unjust and unreasonable, or more than the defendant is authorized to charge by Section 1, it is difficult to see in what respect the public are prejudiced as unjustly discriminated against by the arrangement.

But aside from this view of the subject, in what respect does the difference which defendant makes in the rates charged the single passenger and the party of ten or more travelling together on a single ticket, conflict with the provisions of Sections 2 and 3 of the Act? Under the flexible and elastic rule prescribed by said sections, construed in the light of Section 1, a difference in charges, while an element in the proper definition of unjust discrimination or undue preference, is by no means the sole or controlling factor. To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of *like kind of traffic*, under substantially the same circumstances and conditions. In respect to passenger traffic the positions of the respective persons or classes between whom differences in charges are made, must be compared with each other, and there must be

found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination. The sections substantially adopt the principle laid down in Hays vs. Penna. R. R. Co., 12 Fed. Rep., 369, where the Court, after stating that a common carrier had no right to make unreasonable and unjust discriminations, said: "But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. *It may, however, be said that it is only where the discrimination inures to the undue advantage of one man in consequence of some injustice inflicted on another that the law interferes for the protection of the latter.*" It cannot be properly said in the case under consideration that the lower rate given to a party of ten or more confers upon such party an undue advantage in consequence of injustice inflicted upon the single passenger.

There is nothing competitive in the traffic of the single passenger and the party of ten or more, which would make lower rates to the latter operate prejudicially to the former. It is well understood that the cost of transportation service to the carrier decreases as distance increases, as trips are multiplied, and as the number transported is enlarged. It costs the carrier less proportionately to transport a party of ten or more than it does to carry a single passenger. The carrier is entitled to a fair profit for its services, and when the profit derived from the larger number carried at reduced rates reasonably corresponds with that resulting from the carriage of an individual at a somewhat higher rate, what unjust discrimination is made, or in what respect is the individual subjected to undue prejudice or disadvantage? A single passenger desiring or proposing to make ten or more sepa-

rate trips, may procure a ticket for the designated number of trips at rates lower per mile than are charged the single passenger on a single-trip ticket between the same points. Has it ever been held that this would operate to confer an undue advantage upon the one, or subject the other to undue disadvantage? A passenger on a through ticket from New York to Cincinnati travels at a lower rate per mile between Pittsburgh and Cincinnati than is charged the passenger travelling only between the last named places. The two may travel on the same train and in the same car, but the difference in the rates each is paying over the same distance is not unjust discrimination or undue preference, because the service is not identical. (Union Pacific Ry. Co. v. U. S., 117 U. S., pp. 355–363.) But what is the real underlying principle which sanctions and justifies the difference in charges in such cases? It is that the carrier may make reasonable concession in the way of reduced rates in consideration of longer service and of more frequent trips. The reason and the principle equally apply to an adjustment of rates based upon numbers transported. What difference or distinction is there between transporting a single passenger a given distance at reduced rates as compared with the single-trip rates in consideration of his making ten or more trips, and the transportation of ten or more persons travelling together on a single ticket over the same distance on one trip at the same reduced rates? There being no competitive relation between the single passenger and the party of ten or more, the relative cost of service in their transportation being different, the profit derived from one fairly corresponding with that received from the other, and the inducement on the part of the carrier for making the reduction in favor of party-rates being the development and maintenance of a class of traffic which the evidence shows cannot and will

not stand a higher rate than two cents per mile, we can not properly compare the single passenger with the party class of ten or more, nor find that the reduced charge allowed the latter constitutes, under the circumstances, undue preference in favor of such parties or undue prejudice against the single individual.

Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at Common Law free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound and adopted in other trades and pursuits.

Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services? In Nicholson v. Great Western Ry. Co., Vol. 1, Railway Cases by Neville & Macnamara, p. 147, which involved the "undue preference" clause of the Act of 1854, Earle C. J., said: "I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as free as any merchant subject only (as to this Court) to the duty of acting impartially without respect of persons; and this duty is performed when the offer of the contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists. Contracts for long distances may be beyond the needs of those whose traffic is confined to a home district;

but the power of the railway company to contract is not restricted by these considerations."

It will be seen from an examination of the English Railway Traffic Acts of 1845 and 1854 that Section 90 of the former and Section 2 of the latter was substantially adopted and embodied in Sections 2 and 3 of the Act to Regulate Commerce. Section 90 of the English Act of 1845 required that tolls were at all times to be charged "equally to all persons and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods and carriages of the same description . . . passing only over the same portion of the line of railroad under the same circumstances; and no reduction or allowance in any such tolls should be made, either directly or indirectly, in favor of or against any particular company or person travelling upon or using the railway." Section 2 of the Act of 1854, after requiring all railway companies subject to the law to afford all reasonable facilities, according to their respective powers, for the receiving, forwarding and delivering of traffic, provided that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person, or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The English cases upon the question of "undue preference" which have arisen under said sections, will be found to confirm the construction we have placed upon Sections 2 and 3 of the Act, and also show the elements which may properly be considered in determining whether "undue preference" has been given or "undue disadvantage"

has been imposed. The history and bearing of the equality clause of the Act of 1845 is elaborately discussed by Blackburn, J. in the case of Great Western Ry. Co. v. Sutton, L. R. 4 H. L. 238; 38 L. J. Ex. 177. With respect to the "undue preference" forbidden by Section 2 of the Act of 1854, which was a mere enlargement of Section 90 of the Act of 1845, the English cases, stated generally, hold that a preference to be "undue" must be a preference of a person similarly circumstanced and bringing a similar profit to the company.

On Hozier v. Caledonian Ry. Co. Vol. 1 N. & M. Ry. Cases, p. 30, where the passenger rates between certain stations were complained of as constituting undue preference. The Lord President said "It (the Act) provides for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain."

In Jones v. The Eastern Counties Ry. Co. 1 N. & M. Ry. Cases, p. 45, the undue preference complained of was a preference given to the inhabitants of Harwich over those of Colchester in the matter of season tickets, lower rates being conceded to the former on longer distance than were allowed to the latter, but the Court held that the difference did not constitute a case of "undue preference" within the Act.

In the cases of Painter v. London, Brighton & South County Ry. Co. 2 C. B. N. S. 702 and Infracomb T. C. Co. v. London S. W. Ry. Co., W. N. p. 289, it was said that regard must be had in the general convenience of the public rather than to the wishes or interests of individuals, and that it must be clearly shown that the course complained of occasioned some substantial injury or inconvenience to the public.

In the case of Ransome v. Eastern Counties Ry. Co. (No. 1) reported in 1 C. B. N. S. 437; 26 L. J., C. P. 91, Croswell J., in considering the meaning of the expressions "undue or unreasonable preference or advantage" and "undue or unreasonable prejudice or disadvantage," says: "Are those words to be construed with reference to the interests of the parties using the railway only? or may the interests of the railway owners be taken in any manner into consideration?

Ex. gr.: If 1,000 tons can be carried for a lower sum per ton per mile than 100 tons, yielding an equal profit per ton to the railway company, may they so regulate the charges as to derive such equal profit? *Would the lower rate charged for the larger quantity give an undue preference?* . . . . . If that may be done without giving what the statute calls an undue or unreasonable preference, may not the company, in fixing rates, consider the whole profit and not the mere profit per mile, and in order to induce people to carry more on their lines, and longer distances, agree to make a reduction in such cases? It is true that the sender of the smaller quantities for a shorter distance, will pay more per mile and more per ton in the respective cases, but will that be an undue or unreasonable prejudice or disadvantage? . . . . . After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account, and then the question suggested assumes a very complicated and difficult character."

In Oxlade v. North Eastern Ry. Co., 1 C. B. N. S. 454, 26 L. J. C. P. p. 129, it was held that a railway company was justified in carrying goods for one person at a less rate than that at which they carried the same description of goods for another, if there were circumstances which

rendered the cost to the company of carrying for the former less than the cost of carrying for the latter.

In Nicholson et al. v. The Great Western Ry. Co. 5 C. B. N. S. 366; 28 L. J. C. P., p. 89, it was held to be competent for a railroad company to enter into a special agreement, whereby advantage may be secured to individuals in the carriage of goods, where it appeared that in entering into such agreement the company had only the interests of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantage afforded by them was adequate, and the company were willing to afford the same facilities to all others upon the same terms.

In Bellsdyke Coal Co. v. The North British Ry. Co., Vol. 2 N. & M. Railway Cases, pp. 105-110, it was said by the Court: "A railway company pays no more than a due regard to its own interests if it charges for its services in proportion to their necessary cost, and has only such variation in its rates as there is in the circumstances of its customers."

In Baxendale v. Great Western Ry. Co. (Reading Case) 5 C. B. N. S. 336; 28 L. J. C. P. 81, Cochburn, C. J., after stating that, if it were made to appear that the disproportion (in rates) was not justified by the circumstances of the traffic, the Court would interfere, proceeds as follows: "So again if an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, although the Court might uphold such an arrangement as an ordinary incident of commercial economy, provided the same advantages were extended to all persons under the like circumstances; yet it would assuredly insist on the latter condition." And while recognizing

the duty on the part of the Court to redress any injustice or inequality prohibited by the law, he makes the further pertinent observation: "At the same time we must carefully avoid interfering, except where absolutely necessary for the above purpose, with the ordinary right (subject to the above named qualifications) which a railway company in common with every other company or individual possesses, of regulating and managing its own affairs, either with regard to charges or accommodation, as to the agreements and bargains it may make in its particular business."

As regards the "undue preference" branch of the English Acts, "the effect of the decisions seems to be that a company is bound to give the same treatment to all persons equally under the same circumstances; but that there is nothing to prevent a company, if acting with a view to its own profit, from imposing such conditions as may incidently have the effect of favoring one class of traders or one town or one portion of their traffic; provided the conditions are the same to all persons, and are such as lead to the conclusion that they are really imposed for the benefit of the railway company."—(Report of Amalgamation Committe of 1872, p. 13.)

Our Act to Regulate Commerce having adopted substantially Sections 2 and 90 of the English Railway Traffic Acts of 1854 and 1845 respectively, the settled construction which the English Courts has given to their terms and provisions must be received as incorporated into our statutes. McDonald v. Harvey, 110 U. S., 619.

The English cases referred to above and others that might be cited establish the rule that in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate but proper to take into consideration, besides the mere differences in charges, various

elements such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise. The English decisions cited and the case of Donaby Main Colliery Co. v. Manchester S. & L. Ry. Co., 11 App. Cases, p. 97; 55 L. J. Q. B., 181, further establish that the burden of proving the undue preference or the undue prejudice rests upon the complaining party. In the latter case the Earl of Selborne after referring to the objection that it was not shown by the carrier that the reduced rates corresponded with the reduced cost to the company said: "I do not find in the Act that when there is a real difference of circumstances, and nothing to show any want of good faith, the burden of justifying the exact difference of charge (or what is the same thing, the deduction or allowance), by showing a numerical or necessary relation between it and the actual saving is cast upon the company."

Section 27 of the Act of August 10, 1888 (51 and 52 Vict. ch. 25), for the better regulation of railway and canal traffic, changed this rule by providing that where inequalities on rates exist, "the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company." As no such provision is found in our Act, the burden of showing that the difference in defendant's "party" and single passenger rates constitutes undue preference in favor of the former or undue prejudice or disadvantage against the latter, devolves upon the complainant, and must be established as the reasonable and legitimate result of the various elements or considerations above mentioned. There is no pretense or suggestion

that there is any want of good faith in defendant's action, or that the difference in rates complained of was made or is continued with a view to any actual disadvantage of the single passengers or to subject the public to any injury or inconveniences.

Subjecting defendant's rates for single passengers and for parties of ten or more travelling together on a single ticket to the test of the various considerations indicated above by the English decisions as elements in the question, does it clearly appear that such rates are so adjusted as to give an undue or unreasonable preference to one or impose an undue or unreasohable prejudice or disadvantage upon the other class? We think not. In view of the established fact, that it is not claimed or shown that the single passenger rates are unjust and unreasonable, that the "party rates" are just and reasonable, that there is no competition or competitive relation between the two classes, that the "party rates," open to all who chose to avail themselves of the same, are a convenience and benefit to a considerable portion of the travelling public, that the interests of the carrier are reasonably promoted by their use, that the cost of service is relatively or proportionately less for the party of ten or more than for the single passenger, and that the difference in charges does not appear to be improperly adjusted with reference to or unjustified by the actual saving or profit to the company, it cannot be properly said that the traffic is of like kind and that the service is identical or "under substantially the same circumstances and conditions."

The decisions of the State Courts on the subject of unjust discrimination, and the considerations that may be properly looked to in passing upon the question are, we think, in harmony with the views above expressed and with the conclusions reached. See Ragan v. Aikon, 9

Lea (Tenn.) Rep., 609; Scofield v. Lake Shore & M. S. R. Co., 43 Ohio St., 571; Johnson v. Pensacola & P. R. Co., 16 Fla., 623; McDuffee v. Portland, etc. R. R. Co., 52 N. H., 430; Killman v. N. Y. Central & H. R. Co., 100 N. Y., 395; Shipper v. Pa. R. Co., 47 Pa. Rep., 338; Christie v. Mo. Pac. R. Co., 94 Mo. Rep., 453; Boyles v. Kansas Pacific R. Co. (Sup. Ct. of Colorado), reported in Lawyer's Reports Annotated, book 5, p. 480; and Root v. Long Island R. Co. (N. Y.), reported in Vol. 4 Lawyer's Reports Annotated, p. 331.

We think there is no force in the suggestion that "party-rate" tickets, as used by defendant, are more liable to abuse than ordinary or regular single-passenger tickets. In the present case it is clearly shown by the evidence of railroad superintendents and experts familiar with the subject, that such "party-rate" tickets are less liable to abuse than ordinary single tickets. It is manifest from a moment's reflection that the fewer the tickets on which the carrier's transportation services are arranged and conducted, the better it can protect itself and the public against speculators and ticket-brokers. It is also manifest that the larger the number of passengers embraced in a single ticket, the greater will be the difficulty of "scalpers" or ticket-brokers dealing therein. But if the single tickets for parties of ten or more travelling together were liable to the abuses suggested, that fact would hardly control the proper construction of the law, nor tend to establish that their issuance at reduced rates constituted undue preference or advantage on the one hand or undue or unreasonable prejudice or disadvantage on the other.

Our conclusion upon the whole case is that "party-rate" tickets as used by defendant are not in contravention of Sections 2 and 3 of the Act to Regulate Commerce, and

that the order of the Commission requiring and enjoining the defendant to cease and discontinue the use of said tickets, is not lawful and should not be enforced by this Court. It follows that the complainant's bill should be dismissed with costs to be taxed. It is accordingly so ordered and adjudged.

HOWELL E. JACKSON,
Circuit Judge.

A. G. SAFFORD AND JOHN W. HERRON,
Solicitors for Complainant.

JOHN K. COWEN,
HARMON, COLSTON, GOLDSMITH & HOADLY,
HUGH L. BOND, JR.,
Solicitors for Defendant.

SUPREME COURT, U. S.
FILED.
OCT 27 1890
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

THE INTERSTATE COMMERCE COMMISSION, appellants,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.
No. 1438.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

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And now, October 27, 1890, comes the Attorney-General, and moves the court to advance upon its docket the above-named case, on the ground that an immediate decision of the principles involved is required by the public interests.

The following letter has been received from the Interstate Commerce Commission, and presents fully the public reasons why the motion should be granted.

Respectfully submitted.

W. H. H. MILLER,
Attorney-General.

INTERSTATE COMMERCE COMMISSION,
Washington, October 7, 1890.

SIR: The Interstate Commerce Commissioners have the honor to call your attention to a case just entered in the Supreme Court of the United States upon appeal from the circuit court for the southern district of Ohio, in which the Interstate Commerce Commission is appellant and plaintiff, and the Baltimore and Ohio Railroad Company is defendant, and to inform you that it is the earnest desire of the Commission that you should move the court, under the provisions of its twenty-sixth rule, to advance the cause so that it may be heard at an early day.

The case involves the construction of the act to regulate commerce, approved February 4, 1887, as amended by the act of March 2, 1889, and relates to the right, as claimed by the defendant, to carry parties of passengers in the same direction over its road at a less charge for transportation than is made to an individual passenger.

The railroad companies throughout the country very generally refused such rates, upon the ground that they were interdicted by the first four sections of the law and were not within the exceptions stated in the twenty-second section, and the opinion of the Commission upon the question having been sought by the carriers, they were advised that, in the opinion of the Commissioners, such rates were not permitted under the law. The Baltimore and Ohio Railroad Company, however, declined to be governed by this opinion, and continued to issue such rates over its lines.

A formal complaint against that company was made by a rival company, the Pittsburgh, Cincinnati and St. Louis Railway Company, and that case proceeded to a hearing

and determination by the Interstate Commerce Commission adverse to the claim of the Baltimore and Ohio Railroad Company and to the effect that such rates were prohibited by law. The defendant still continuing the practice, the Commission, under the provisions of the sixteenth section of the act, made application to the circuit court for the southern district of Ohio, sitting in equity, for a mandatory injunction. This was heard by the circuit court at Cincinnati on the 23d day of June, 1890, Judges Jackson and Sage presiding, who rendered their decision of the question on or about the 11th day of August, 1890. The circuit court overruled the decision of the Interstate Commerce Commission and dismissed the bill. The appeal now pending has been taken from the decision and judgment of the circuit court.

The case necessarily involves an interpretation of the fundamental provisions of the act to regulate commerce. The decision of the circuit court is founded upon an interpretation of that act differing vitally from the understanding of its provisions by the Commission, and upon which the act has been administered from the outset. According to the view of the Commission the decision is antagonistic to the purposes of the act.

The question immediately involved in the case was, whether so-called party-rate passenger tickets might be sold by a railroad at less rates for more than one passenger than the rate at which single passenger tickets are contemporaneously sold between the same points. The determination of this question involves a consideration of the second section of the act, which prohibits unjust discrimination in rates, and the third section of the act, which prohibits undue and unreasonable preference and undue and unreasonable prejudice, and also a consideration of the twenty-second section of the act, which declares that nothing contained in the act shall prevent the issuance of excursion, mileage, or commutation passenger tickets. The commission found as matter of fact, as well as law, that

so-called party-rate tickets were not included in excursion, mileage, or commutation tickets. It also found that party-rate tickets being distinct in character from the three classes of tickets mentioned, and not being specified in name or by description among the excepted classes in the twenty-second section, were necessarily prohibited by the second and third sections.

The circuit court, in deciding that the tickets in question may be lawfully issued, gave a construction to the act which leaves its prohibitions against unjust discrimination and undue preference without force, and adds to the exceptions of the twenty-second section authority to do what the act does not express. Under the construction of the circuit court the law can not be made operative for the public purposes it was intended to accomplish.

A speedy review of the decision is therefore of the utmost public importance, and the case seems to be clearly embraced among those enumerated in the fifth subdivision of the 26th rule, which may be advanced for hearing by leave of the court.

First. The case is one in which the United States are concerned. Its object is to restrain what is believed to be a violation of a law of Congress relating to the regulation of interstate commerce, over which Congress has exclusive jurisdiction. The Commission in the prosecution of the case acts by the direct command of Congress and represents the Government of the United States. The subject concerns the due and orderly regulation of interstate commerce in accordance with the rules laid down by Congress on that subject. The circuit court has understood those rules differently from the Commission charged with their administration. If the view of the circuit court is correct it is of the greatest importance that it should be so declared by the court of last resort in order that the act may be amended to render it of any public value. If the view of the circuit court is erroneous it is equally important that the error should be corrected at the earliest day

to the end that the law may be administered in accordance with the true intention of Congress.

Second. The case involves and affects matters of general public interest. The law has been generally believed to have for its great object the prohibition of unjust discrimination in the carriage of passengers and freight by railroads. The decision of the circuit court allows this discrimination to be continued on a ground not indicated or specified in the act, viz, the commercial principle of wholesale and retail, which applies to private business, but not, as hitherto understood, to public agencies.

If the true construction of the act allows a party of more than one person to be transported at lower rates than a single passenger, and allows a large shipper of freight, for example, a shipper of two or more car-loads a lower rate than a shipper of one car-load, it is of general public interest that this should be known, by the authoritative judgment of the court of last resort, and that wholesale patrons of railroads may have the benefit of the rule, or if this is contrary to the true purpose and intention of the statute, that it should be so declared and the abuses and impositions that grow out of the wholesale principle as applied to railroad transportation be effectually prohibited.

Third. The case involves the meaning, integrity, and operation of a statute of the United States. As understood and administered by the Commission, one of the main objects of that statute is the establishment of the same equal rates alike for all in the carriage of persons or freight. According to the view of the circuit court, the carrier may justly make any concessions it sees proper in rates or facilities to a large dealer who furnishes the most tonnage, and rightfully refuse the same concessions in rates or facilities to a small dealer who is unable to furnish any considerable tonnage to the carrier; and, if given effect, this view of the circuit court undermines the fundamental purpose of the statute as to equality of rates for all alike,

and gives to combinations and schemes for securing advantages over single individuals a power that would shut out all small competition and put the weak at the mercy of the strong at every turn where railway transportation becomes a matter of moment in business transactions.

Until the court of last resort has determined which of these constructions of this statute is correct, the further administration of this statute by the Commission is to a large extent paralyzed and rendered futile by this decision of the circuit court.

Very respectfully,

W. R. MORRISON,
A. SCHOONMAKER,
W. L. BRAGG,
W. G. VEAZEY,
Commissioners.

The ATTORNEY-GENERAL.

Office Supreme Court U. S.
FILED.
OCT 26 1891
JAMES H. McKENNEY.

In the Supreme Court of the United States.

THE INTERSTATE COMMERCE COMMISSION, appellant,
vs.
THE BALTIMORE AND OHIO RAILROAD Company, appellee.
No. 889.

APPEALED FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF AND ARGUMENT FOR APPELLANT.

By THE ATTORNEY-GENERAL OF UNITED STATES,
SAMUEL SHELLABARGER,
J. M. WILSON, and
ALFRED G. SAFFORD.

In the Supreme Court of the United States.

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THE BALTIMORE AND OHIO RAILROAD Company, appellee.
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BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

First. This case comes into this court by appeal from a final decree rendered in the circuit court of the United States for the southern district of Ohio, on the 23d of August, 1890, which dismissed the bill of complaint named herein below (Rec., pp. 139, 140).

Second. The bill of complaint is one filed by the Interstate Commerce Commission against the Baltimore and Ohio Railroad Company, and was filed under the pro-

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visions of the sixteenth section of the act of Congress (25 Stats., 859) approved the 4th of February, 1887, as amended by the act amendatory thereof, approved the 2d of March, 1889 (26 Stats., 855–9).

Third. This section provides that whenever a common carrier, subject to the act, shall violate, etc., any lawful requirement of the commission, created by the act, not founded upon a controversy requiring a jury, as provided by the seventh amendment of the Constitution of the United States, there—

> It shall be lawful for the Commission, or for any person or company interested in such order or requirement, to apply, in a summary way by petition, to the circuit court of the United States, sitting in equity, in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be, etc.

The section provides that notice be given to the common carrier; requires the court to hear and determine speedily, as a court of equity, the matter in controversy without the formal pleading applicable to ordinary suits in equity, but in such manner as to do justice in the premises; authorizes an injunction or other order to be issued, if it is found that a lawful order of the Commission has been violated, restraining further disobedience, and enjoining obedience; also authorizes attachments, or any other proper process, etc., etc. It also authorizes an appeal to this court where the subject in dispute equals in value $2,000, or more, under the same regulations as appeals in other cases are taken.

The substance of the bill of complaint (Rec., p. 1–5) is as follows: It alleges—

(1) That the commission was created under such statutes of 1887 and 1889; that

(2) The Baltimore & Ohio Railroad Company is a corporation created, chartered, and existing under the laws of Maryland, with its principal office in Baltimore, Md., and that it was, at commission of grievances, a common carrier, engaged in the transportation of persons and property, through several States, under a common control, for continuous carriage, and was then engaged in such business between cities and towns in Ohio; also in West Virginia, Pennsylvania, Maryland, and New York, and was, during all said time, and still, subject to the interstate commerce act; that

(3) On the 10th of July, 1889, defendant was duly impleaded in a controversy, not requiring a jury, before said Interstate Commerce Commission, on the petition of the Pittsburg, Cincinnati and St. Louis Railway Company, a corporation duly created and organized under the laws of Pennsylvania, West Virginia, and Ohio, for alleged violation, on the part of the defendant, of the provisions of said interstate-commerce acts, such violations being, at large, set forth in the petition of said Pittsburg, Cincinnati and St. Louis Railway Company, such petition being made a part of complainant's petition and is Exhibit A (Rec., p. 5), the substance of said petition, which is Exhibit A, being that the business of the said Pittsburg, Cincinnati and St. Louis Railway Company is competitive with that of the Baltimore and Ohio Company, and that the latter company had then in operation

certain so-called "party rates," whereby parties of ten or more, traveling together, are transported on one ticket at 2 cents per mile *per capita*, which is less than the regular fare for a single person, and that it was in the habit of selling other tickets, that is to say, round trip excursion tickets without publicly posting them, that this practice is forbidden by said interstate-commerce acts, and, for that reason, the Pittsburg, Cincinnati and St. Louis Railway Company has declined to put in effect said party rates, etc.; that by reason of these party rates being allowed on the Baltimore and Ohio road, and not allowed on the Pittsburg, Cincinnati and St. Louis road, traffic is diverted from the latter road, and the petition asks for an order putting an end to such party-rate tickets on the Baltimore and Ohio lines.

(4) That thereafter, on the 31st of July, 1889, the Baltimore and Ohio Company filed its answer to said petition, Exhibit A, such answer being made part of the petition, as Exhibit B (Rec., p. 7).

(5) That, afterwards, said case, being at issue on said petition, Exhibit A, and answer, Exhibit B, came on for investigation before said Interstate Commerce Commission, and, on the 15th of November, 1889, each party appeared before said Commission; that on the hearing it was made to appear to the satisfaction of the Commission that the Baltimore and Ohio Railroad Company had violated the provisions of the said interstate-commerce act, as charged in petition, Exhibit **A**, and the Commission then duly determined the matters in issue, and made a report in writing, which included findings of fact on which the conclusions of the Commission were based, and

the determinations of the Commission in regard thereto were made part of the petition as Exhibit C (Rec., p. 9).

This Exhibit C begins on page 9 and ends on page 13, and finds that the party-rate tickets had been adopted by the Baltimore and Ohio Company, and were in operation, whereby parties of ten or more persons, traveling together on one ticket, are transported over respondent's lines and roads, between stations located thereon at 2 cents per mile per capita, which is less than the regular rate for a single person, said rate being about 3 cents per mile; that said company also sells round-trip excursion tickets between points on its lines at less than the rates for ordinary tickets without publicly posting, in its ticket offices or elsewhere, the rates at which the tickets are sold, and said report (Rec., p. 13) concludes in these words:

> The respondent's railroad company must therefore be notified to immediately cease and desist from selling said party-rate tickets, and ordered to print and post excursion rates according to the provisions of section 6 of the act to regulate commerce.

(6) That, thereafter, and forthwith, upon the determination of the case, as aforesaid, the Commission duly formulated an order and notice in relation to said issue, agreeably to the statute, which order and notice are made part of the petition and are Exhibit D (Rec., p. 13).

This order recites that, amongst other things, the Commission had decided that schedules of rates and fares charged for round-trip passenger excursion tickets must be printed, kept open to public inspection, and posted, as required by section 6; also that so-called "party-rate tickets," sold at reduced rates and entitling a number of persons to

travel together on a single ticket or otherwise, are not "commutation tickets" within the meaning of section 22 of said act to regulate commerce; that when the rates at which such tickets for parties of ten or more are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between single points, that constitutes unjust discrimination and is, therefore, illegal.

After so reciting, the said order adds that the defendant, the Baltimore and Ohio Railroad Company, is required to print, post, and file schedules showing the rates, fares, or charges, now or hereafter established by it, for round-trip passenger excursion tickets between points on its lines, and on the lines of other common carriers with whom it joins, or may hereafter join, establishing rates, fares, and charges therefor in conformity with section 6.

Said order further ordered that the Baltimore and Ohio Company forthwith wholly and immediately cease and desist from charging rates for transportation over its lines of a number of persons traveling together in one party which are less to each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between single points.

And it was further ordered that a notice embodying this order be forthwith sent to the defendant corporation, with a copy of the report of the commission herein, in conformity with section 15 of said act to regulate commerce. (Rec., 13, 14.)

(7) That, on the 4th of March, 1890, the Commission caused a copy of the said report, the said order, and the

said notice to be delivered to the Baltimore and Ohio Company, and it was not shown to the Commission that the said company had ceased from the violations of law set forth in the report and order, but, on the contrary, that, unmindful of its duty and of the determination of the Commission, as aforesaid, the Baltimore and Ohio Company, through its officers, etc., wholly disregarded and set at naught and wilfully violated the order, and had, since the service of said notice, wholly neglected and refused to furnish to the Commission, and to print, post, and file, schedules showing rates for round-trip passenger excursion tickets, as required by law, and the order aforesaid, and that it had not ceased from charging rates for transportation over its lines to a number of persons traveling together in one party which are less than those contemporaneously charged for each person, under lawful schedules, for single persons between the same points.

It then proceeds to set forth specifically the cases in which such violations occurred.

(8) The petition then prays for a subpœna and that defendant be required to answer on oath; that an order be made, pending the case, such as will secure a speedy hearing; that an order be made directing the method of service; that an order be made, pending the hearing, such as may be necessary for the prosecution of all inquiry; that an order be entered, pending the case, granting a writ of injunction; that a decree be entered requiring the Baltimore and Ohio Company to pay such sum, not exceeding $500, for every day, after a date to be stated in the decree, that the Baltimore and Ohio Company shall fail to obey said injunction, and for further relief.

After filing this petition such steps were duly taken in the case, as appears by the record, pages 15 to 21, as duly brought the defendant into court with its answer.

On the 31st day of May, 1890, the Baltimore and Ohio Company filed its answer (Rec., pp. 21–25). The substance of this answer is as follows:

(1) Admits the charter of the Baltimore and Ohio Company under the laws of Maryland, and that principal office is in Baltimore; that it is a common carrier engaged in transporting passengers and property substantially as averred.

(2) Admits that the petition (Exhibit A) was filed; also the answer (Exhibit B), as averred, and admits that hearing was had upon the merits, as averred.

(3) Denies that on such hearing it was made to appear that the Baltimore and Ohio Company had violated the act to regulate commerce, or its amendments; denies that the Commission duly determined the matters in controversy; admits that the Commission made a report (Exhibit C), but says that the conclusions of fact stated in the report, which are afterwards referred to, are not true and not justified by the evidence, and says that the conclusions of law contained in the report are not true constructions of the act.

(4) Admits the making of the order (Exhibit D) and the service thereof, but denies its legality.

(5) Denies that the Baltimore and Ohio Company has refused, and still refuses, to furnish to the Commission and to print, post, and file schedules showing rates, fares, and charges established for round-trip passenger tickets; admits that it has not wholly ceased from charging rates

for transportation over its lines for a number of passengers traveling together in one party upon one ticket which are less for each person than rates contemporaneously charged by it for transportion of single passengers between the same points, and admits the substantial truth of the averments of the petition in that regard, and that the Baltimore and Ohio Company has not complied with the Commission's order relating to the transportation of parties of ten or more on a single ticket, and says that the Baltimore and Ohio Company was *not bound* to comply with the order, which was based upon an erroneous construction of the act.

Admits that it is the owner or lessee of railroads and rolling stock with which it carries on business as a common carrier; that, as such owner and lessee, at the date of the passage of the said act to regulate commerce, and ever since, it has, by its charter and law, possessed the right to carry passengers on its road, and the right to receive reasonable compensation, which rights are *private property*, protected by the Fifth and Fourteenth Amendments to the Constitution of the United States; that respondent is protected by said constitutional rights in the enjoyment of its property, and can not be deprived of the same without just compensation; that it has, and always had, the *right to fix its charges* for transportation on its roads within the limits prescribed by its charter and the laws of the States in which its roads lie outside of Maryland, subject only to the decisions of the judiciary departments of the State and National Governments, respectively, upon the reasonableness of the rates so fixed by law, and that the question of reasonableness is a judicial

question, and that no arbitrary rules can be laid down therefor by Congress or State legislatures.

(7) That for years prior to the passage of the act to regulate commerce railroad carriers in the United States had habitually made a rate of charges for passengers making frequent trips, trips for long distances, trips in parties of 10 or more, lower than regular single fare charged between the same points; that many forms of tickets had been in use for these classes of passengers prior to the enactment of the interstate commerce act; that these different kinds of tickets were so in use, including tickets for parties of 10 or more, and concludes this enumeration by saying that "it is an established principle of business that whenever the *amount* of travel more than *made up* to the carrier for the *reduction* of the charge per capita, then such reduction was 'reasonable' and just in the interest of both the carrier and the public, and that this practice, by long use, was found to be sound." (Rec., p. 51.)

(8) It alleges that since the passage of the act to regulate commerce the Baltimore and Ohio Company has continued as theretofore the practices above stated of making lower charge on passenger travel in consideration of the *amount* and *frequency* of the travel; that the charge fixed for parties of 10 or more on a single ticket had been 2 *cents* per mile per capita, that being the rate charged on thousand-mile tickets, and higher than the rate charged on "long-distance passenger travel" and "excursion travel," and higher than the general rate for "surburban travel;" that the charge on a single ticket is just and reasonable affording fair compensation, and was just and reasonable and for the best interests of the carrier and public, because

high rates would destroy business; that this consideration induces the Baltimore and Ohio Company to make such lower charge for transportation of parties as aforesaid, and makes it the interest of the Baltimore and Ohio Company, as a carrier, to make such lower charge, and are the same reasons that induced such lower charge for passengers by buying mileage tickets, time or trip tickets, and excursion tickets.

That while "party-rate" tickets are principally used by amusement companies, because no other meets their requirements, yet the Baltimore and Ohio Company has *avoided confining* such tickets to any class of business by *offering* them to the *entire public;* that in the use of party-rate tickets danger that speculators or ticket brokers might take advantage of them had been avoided by issuing but *one ticket* for a whole party; that as such tickets are now used by it they can not be used for speculative purposes, and offer no opportunity of evading the law in the hands of tickets brokers; avers that it may legally make such charge *per capita* for persons traveling on "party-rate" tickets between same points, the character, circumstances, and conditions of the service being substantially different, and that such lower rate *per capita* to members of parties gives no undue or unreasonable advantage, and subjects no person, firm, corporation, or locality to undue or unreasonable prejudice.

(9) That said order of the Commission is not legal, so far as relates to so-called "party rates," for the reason, amongst others, that the order is based on an erroneous finding of fact and law, stated in the opinion of the commissioners and in the second paragraph of the order,

which second paragraph, in substance, is that "party-rate" tickets, sold at reduced rates, entitling a number to travel together, on single ticket or otherwise, are not "commutation tickets" within the meaning of section 22, and that when the rates at which such tickets are sold are lower for each member than rates contemporaneously charged for single passenger tickets between the same points, that constitutes unjust discrimination.

Asserts that such finding assumes that the true construction of said act is one "the design of which is to put each individual, in the matter of transportation, on exact equality, with only such exceptions as the act itself specifies;" that in their report and order they therefore assume that sections 2 and 3 of the act require all passengers starting from the same point and having the same destination to be charged the same rate per mile, unless the passenger be one of the class of persons named in section 22; that is, the Commission assumes that the second and third sections *laid down an absolute rule, to which section* 22 *creates certain exceptions*, and that the Commission assumes that contemporaneous service is necessarily alike if the passengers between whom comparison is had travel from the same point to the same destination in the same car, and that commercial circumstances and conditions are not to be considered except in cases provided for in section 22, and says that these considerations are unsound, and, if adopted, *would render the act unconstitutional*, as beyond the power of Congress; that the true construction of the second section of the act requires the same charge only when a difference in charge would work prejudice and disadvantage without reason therefor.

That the twenty-second section, so far from making exceptions to an otherwise absolute rule, was intended as an *additional precaution* to insure giving to the second and third sections the construction intended by Congress; that the twenty-second section is a legislative declaration. That under the conditions of the second section, circumstances and conditions of a commercial nature are to be considered, and among such circumstances and considerations so to be considered, in cases of passenger traffic, the *amount* of service purchased and contracted and the interest of the carrier in stimulating travel are to be considered.

That to adopt the Commission's construction of section 22 is to hold that Congress deliberately created discriminations in favor of certain classes of travelers against other classes, who offer to the railroad the same inducements and business reasons for a charge lower than the single-fare charge; that such a construction is inconsistent with the first section of the act and with the intention of Congress, as shown throughout the law. That respondent has shown in previous sections of the answer that Congress has *no power* to fix such an absolute rule as that assumed by the Commission to be fixed by sections 2 and 3, since by so doing Congress would deprive respondent of property rights secured by the Constitution.

Then follows the testimony in the case, from page 27 to page 115 of the record.

This testimony, so taken by the respective parties, is addressed to the purpose, on the part of the Commission, of the establishment of the fact that, at the date of the passage of the interstate commerce act, the kind of tickets named in

section 22 of the act, to wit, "mileage tickets" "excursion tickets," and "commutation tickets," were known in the railroad commerce of the country as terms of that trade or business, these having their defined meaning in the business, and that such meanings, as to each of the three classes, did *not* take in or embrace "party-rate tickets," such as are named in the prohibitory order of the Commission (Exhibit D, p. 13); whilst on the part of the respondent, the Baltimore and Ohio Railway Company, its evidence was directed to showing that whilst said three classes of tickets named in section 22 were known terms of railroad passenger commerce, yet the fact was that said "party-rate tickets" were included at the date of the passage of said act within the meaning of one or all of said terms, "mileage," "excursion," "commutation" tickets.

We shall hereafter present in this brief, a notice of this evidence in more detail than is here done; (but in this "statement of the case," we only specify that we shall claim that the evidence establishes, by clear preponderence, what is stated in the opinion of Sage, J. (bot. p. 116), in the following words:)

> A question was made whether these tickets were known and recognized in railroad circles before and at the date of the passage of the act as commutation tickets. The evidence of railroad men of experience and promience was taken upon this point. *It clearly establishes the negative of the proposition.*

The judge is here speaking of "single tickets" issued to a party of 10 or more.

The only other statement here required, in fully presenting the character of the case, we now add, by quoting

from the language in the opinion of Justice Sage (Rec., p. 116, fol. 248), as follows:

> No testimony was taken in support of the averments of the bill denied by the answer, and at the hearing this part of the complainant's case (to wit, refusal to post respondent's rates or excursion tickets) was abandoned, *leaving as the only questions to be decided those relating to the sale of party tickets as conducted by the respondent.*
>
> *The facts are not in dispute.* A single ticket is issued to a party of 10 or more at the fixed rate of 2 cents per mile per capita, which is a reduction of about 33⅓ per cent. from the regular fare for a single person. This rate is scheduled and posted and open to the public.

By what has now been gone over in this "statement of the case," it will be seen that whilst the question here raised by the record is one which involves quite a number of subordinate questions in order to its right solution, yet it is true that there is really but one question in the case, and that a question of law, viz, was there any valid law in force at the date when the complainant, the Interstate Commerce Commission, made the order set forth in Exhibit D (Rec., p. 13, 14), which empowered the said Commission to make the said order, and which authorized the prosecution of the present suit under section 16 of the Interstate Commerce Act for the violation of the requirements of said order (Exhibit D).

ASSIGNMENT OF ERRORS.

I. The court below erred in holding that the practice of the defendant in persisting in the use of the one-way party-rate tickets described, and the use of which was

prohibited by said Commission in its order, set forth in Exhibit D, and made part of the petition, after the service upon the defendant of the said order (Exhibit D), was lawful, and not in violation of the provisions of said act to regulate commerce.

II. The court erred in holding that the said order of said Commission, in ordering that the defendant—

> Do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points,

as made by said Commission, was without any authority found therefor in said interstate commerce act, or in any other law then in force, and that said order was and is void.

III. And for other errors apparent in the record.

BRIEF.

We now turn to a careful consideration of the questions of law and fact raised by the present appeal.

In entering upon this discussion, it seems to us to be logically appropriate to consider first of all the constitutional questions presented by the defendant's answer.

CONSTITUTIONAL QUESTIONS.

In entering upon a notice of the constitutional points raised by the defendant's answer (but, so far as we now perceive, not passed upon by the court below), it is

requisite to notice distinctly what is the *breadth* of the defendant's constitutional points in objection to the validity of the order Exhibit D.

In regard to this, we do not understand the answer to raise the question as to whether the interstate commerce act is void in its *totality* as an act beyond the power of Congress to enact.

So, also, neither do we understand that the answer makes the point that it is beyond the power of Congress, in its exercise of its authority to "regulate commerce between the several States," and confining its legislation to such interstate commerce, to regulate reasonably and justly the rates of fare by common carriers.

What we do understand the answer to assert in this regard is, that the defendant, by its charters, and by the laws of the States where its lines are, is authorized to carry on the business of a common carrier, and was, by its charter, at the date of the passage of said act to regulate commerce, and has ever since, possessed, and still has the right to carry passengers on its said road, and the right to *receive a reasonable compensation therefor;* and that the defendant has, and has always had, by its charter, etc., the further right to fix its charges for the transportation by it of persons and property on said railroads, within the limits prescribed by its charter, and by the laws of those States in which said railroads lie outside of the State of Maryland, subject only to the decisions of the judiciary departments of the State and National Governments respectively, upon the reasonableness of the rates so fixed by it (Rec., p. 32, fol. 49–50); and, further, that

Congress has under the Constitution *no* power to fix any *absolute rule* such as that assumed by the Commission to be fixed by the second and third sections of the act to regulate commerce, because by so doing Congress would deprive this respondent of property rights secured to it by the Constitution which cannot be taken without just compensation. (Rec., p. 25, fol. 55.)

The position, stated in other words, is that Congress has not the power to enact a law which has the meaning, design, and effect which is attributed to it by said order Exhibit D; this not because Congress, in the regulation of interstate commerce, may *never* regulate the rates of fare charged for such interstate commerce, but because in this case the giving to the interstate commerce act the design and interpretation which makes it within the power of the Commission, and of the courts on appeal from the Commission, to deprive the respondent of its said "vested property rights" held under said charters and State laws before and after the passage of said interstate commerce act, is to give it an interpretation not intended by Congress, and one which, had Congress so intended, would render the law invalid as against said vested property rights of respondent—this because such a holding would make the law deprive respondent of his property without due process of law—would be a taking of respondent's property without just compensation, and would be to impair the obligation of the charter contract.

Such we understand to be the exact position of defendant regarding the bearing of the Constitution upon the present case.

It is, however, proper for us in this brief to consider this question as if the meaning of the defendant was to deny *generally and broadly* the constitutionality of the interstate-commerce act if it is to be considered as one giving to the Commission, and, on appeal, to the courts, power to regulate interstate commerce in the matter of the rates of charge for carrying on that commerce; and *also* to consider the question as if defendant meant to deny no more than the power of Congress, as against the alleged charter rights of defendant to regulate fares.

In entering upon the consideration of the constitutional point just stated, to wit, whether Congress, in the exercise of its power over interstate commerce, may regulate the rates of fare charged by common carriers in transporting such interstate commerce, we enter upon a discussion, which, as seems to us, is absolutely exhausted by decisions of this court, and its discussion is thoroughly threadbare.

Still, because of the transcendent importance of the question raised by the present appeal, including, it is supposed, the present question, we may be allowed to state, from a comparatively few of the innumerable decisions of this court, what is the state of constitutional law upon this point which these decisions have settled.

We start with the definition of the word "commerce" and of the word "regulate," as these words are found in the clause in the eighth section of the first article in the Constitution, and which clause reads as follows:

> Congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes.

The definition given of this word "commerce" by this court in the opinion by Chief Justice Marshall, in the case of *Gibbons* vs. *Ogden* (9 Wheat., p. 196), is the one which has been accepted by the courts of the country since it was given as accurate, and it has become the formula in which the definition has since been universally expressed.

Speaking of this power over interstate commerce the Chief Justice says:

> This power, like *all* others vested in Congress, is *complete* in itself; may be exercised to its *utmost extent, and acknowledged no limitations other than are prescribed in the Constitution.* * * * *If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of that power as are found in the Constitution of the United States.*

The cases in which this definition by Chief Justice Marshall of the word "commerce," as employed in said constitutional clause, is reaffirmed are simply innumerable. Among others are *Leisy* vs. *Hardin* (135 U. S. R., 108), *Passenger Cases* (7 How., 436, 437), *United States* vs. *Holliday* (3 Wall., 417), *Henderson* vs. *Wickham* (92 U. S. R., 270), *In re Rahre* (140 U. S. R., 556, 557).

The same thing will be found regarding the *plenary* power of Congress over interstate commerce, and holding that it, when entered upon by Congress, *is as broad as the power of the States over State commerce*, will be found in the many cases which, in another connection, we will have occasion to point to.

SOME OF THE DECISIONS AS TO POWER OVER COMMERCE.

The following decisions bearing upon the question of the extent of this power of Congress over the commerce between the States may be here appropriately pointed to.

In the passenger cases (7 How., p. 285), it was held that this commerce between States includes an intercourse of *passengers* as well as the importation of merchandise.

It was, therefore, held in the case of the *People* vs. *General Transatlantic Company* (107 U. S. R., 59) that a State tax upon *passengers*, whether citizens or foreigners, entering a port of that State, is unconstitutional as a regulation of commerce between us and foreign nations.

The same thing in effect is held in case of *Chy Lung* vs. *Freeman* (92 U. S. R., 275).

In *Gloucester Ferry Company* vs. *Pennsylvania* (114 U. S. R., 196), it was held that receiving and landing the *passengers* is incident to their transportation, and all restrictions by State taxation on such transportation is invalid because within the power of Congress to regulate such commerce.

In the above-named case the court held that the power of Congress over interstate commerce vested in Congress the power to *prescribe rules* by which it shall be governed; that is, the conditions upon which it shall be conducted, to determine when it shall be free, and when subject to duties or other exactions (92 U. S. R., 280; 114 U. S. R., 196, etc.).

In the same case it was held that this interstate commerce includes the transportation of *persons* and property

and the navigation of public waters as well as the exchange of commodities.

In *Leisy* vs. *Hardin* (135 U. S. R., 100), this court held that a State statute prohibiting the sale of intoxicating liquors, except for medical, chemical, or sacramental purposes, and under a license from a county court of a State, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another State, is unconstitutional and void as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

And this case overrules *Pierce* vs. *New Hampshire* (5 How., 504).

On pages 105–109 this court states what brings a matter within the class "interstate commerce," and, as to such class, states the exclusive power of Congress over the subject-matter as follows: (pp. 109, 100.)

> Whenever, however, a particular power of the General Government is one which must necessarily be exercised by it, and Congress remains *silent*, this is not only *not* a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the General Government intended that power should not be affirmatively exercised, and the action of the States can not be permitted to effect that which would be incompatible with such intention. *Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character and must be governed by a*

uniform system so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammeled. (*County of Mobile* v. *Kimball*, 102 U. S. R., 691; *Brown* v. *Houston*, 114 U. S. R., 622–631; *Wabash and St. Louis Railway* v. *Illinois*, 118 U. S. R., 557; *Robbins* v. *Shelby Taxing District*, 120 U. S. R., 489–493.)

Here, then, is a decision expressly affirming, not only the supreme power of Congress over interstate commerce, not only affirming that this power of Congress excludes all power over the subject by the States, but which also affirms that the *silence* of Congress upon any particular subject-matter, embraced within interstate commerce, is no license to the State to occupy that field, but such silence is a fact that makes the commerce in that subject-matter absolutely free.

In the case of *Mobile County* v. *Kimball* (102 U. S. R., 691) the court held that Congress has power to prescribe the conditions upon which commerce shall be conducted between our citizens and citizens or subjects of other countries and between the citizens of the several States, and to promote its growth and insure its safety.

In *Railroad Company* vs. *Pennsylvania* (136 U. S. R., 114) this court held that where a railroad is a *link* in a through line by which passengers and freight are carried from State to State, it is then one engaged in interstate commerce, and if a tax imposed by a State upon a corporation owning such road, for the privilege of keeping an office in the State for the use of its officers, etc., it is a tax on commerce between the states and is repugnant to the Constitution of the United States.

In *United States* vs. *Coombs* (12 Pet., 72) the court held that this power of Congress over interstate commerce extends to acts done which interferes with, or obstruct or prevent, the true exercise of the power to regulate commerce, and that under this clause of the Constitution, giving power to Congress over interstate commerce, Congress has power to punish offenses of selling merchandise belonging to a wrecked ship.

In *Union Pacific Railway Company* vs. *Myers* (115 U. S. R., 1) this court held that the authority of the Kansas Pacific Railway Company to extend its road into Missouri was granted by Congress under its power to regulate commerce among the several States.

In the cases of *The Pensacola Telegraph Company* vs. *Western Union Telegraph Company* and *The Western Union Telegraph Company* vs. *Texas* (105 U. S. R., 460) this court held that the power to regulate commerce among the several States included the *control* of the electric telegraph as an accessory of commerce; that this power is not limited to such instrumentalities as were in use when the Constitution was adopted.

In *Pensacola Telegraph Company* vs. *Western Union Telegraph Company* (96 U. S. R., p. 1) the court held that the act of July 24, 1866, giving telegraph companies the right to run lines along the military and post roads, *in effect amounts to a monopoly of all the State telegraph companies and is valid.*

In *Gloucester Ferry Company* vs. *Pennsylvania* (114 U. S. R., 196) the court held that commerce between the States which consists in the transportation of persons and property between them is a subject of national character

and requires *uniformity of regulation*. Congress alone can deal with such transportation and its known action is a declaration that it shall remain free from the burdens imposed by State legislation.

In the case of *Robbins* vs. *Shelby Taxing District* (120 U. S. R., 489–492) this court held what is thus expressed in the opinion by Justice Bradley:

> The Constitution of the United States, having given to Congress the power to regulate commerce not only with foreign nations, but among the several States, that power is *necessarily exclusive* whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. This was decided in the case of *Cooley* vs. *Board of Wardens of the Port of Philadelphia* (12 How., 299, 319), and was virtually involved in the case of *Gibbons* vs. *Ogden* (9 Wheat., 1), and has been confirmed in many subsequent cases; amongst others, in *Brown* vs. *Maryland* (12 Wheat., 419), *The Passenger Cases* (7 How., 283), *Crandall* vs. *Nevada* (6 Wall., 35, 42), *Ward* vs. *Maryland* (12 Wall., 418, 430), *State Freight Tax Cases* (15 Wall., 232, 279), *Henderson* vs. *Mayor of New York* (92 U. S. R., 259, 272), *Railroad Company* vs. *Husen* (95 U. S. R., 465, 469), *Mobile* vs. *Kimball* (102 U. S. R., 691, 697), *Gloucester Ferry Company* vs. *Pennsylvania* (114 U. S. R., 196, 203), *Wabash, etc., Railway Company* vs. *Illinois* (118 U. S. R., 557).

The case of *Wabash, etc., Railway Company* vs. *Illinois* (118 U. S. R., 557), cited *supra*, is one of special interest in this connection. It was a case were a statute of Illinois provided that if any railroad company within the State should *charge for transporting passengers or freight* of the same class the same or a greater sum for any distance than

it does for a longer distance, it shall be liable to a penalty for unjust discrimination.

The defendant made discrimination over the same road from Peoria and Gilman to New York, charging the same for the same class of goods carried from Gilman as from Peoria, the former being eighty-six miles nearer New York than the latter. There this court held that the supreme court of Illinois, in holding that the statute of Illinois must be construed to include a transportation of goods under one contract and by one voyage from the interior of the State to New York, was right. It also held that such transportation is "commerce amongst the States," even as to that part of the voyage which lies within Illinois, and this while it is not denied that there may be transportation of goods which is *begun and ended* within Illinois, and which does not connect with any from outside the State which is *not* commerce among the States.

It also holds that the latter class is subject to regulation by the States; and, as to it, the statute of Illinois is valid. But the former is national in its character, and its regulation is confined to Congress by the clause of the Constitution which empowers it to regulate commerce among the States.

It also holds as to the case of *Munn* vs. *Illinois* (94 U. S. R., 113); *Chicago, Burlington and Quincy Railroad Company* vs. *Iowa* (94 U. S. R., p. 155); *Peik* vs. *Chicago and Northwestern Railway* (94 U. S. R., 164), that these do not conflict with the doctrines affirmed in this decision.

The case also asserts the doctrine that, notwithstanding what is said in the case of *Munn* vs. *Illinois*, and the others just named, this court holds now, and has never

consciously held otherwise, that a statute of a State, intended to regulate or to tax, or to impose any other restrictions upon the transportation of *persons* or property or telegraph messages from one State to another, is not within the class of legislation which the States may enact even *in the absence of legislation by Congress*, and that such statutes are void, even as to that part of such transportation which may be within the State.

The case, therefore, reverses the decision of the supreme court of Illinois as to that part of it which held that State legislation, even so far as relating to commerce within the States, was valid (118 U. S., 558).

The principle announced in the last Legal Tender case (see 110 U. S. R., on p. 447), as a criterion of constitutional legislation by Congress, seems to us to apply forcibly in this connection.

That principle is, that where an express power is conferred on Congress by the Constitution, such incidental powers may be exercised by Congress in connection with the power expressly granted as accord with the usages of sovereign governments respecting the subject of the power. Congress was expressly empowered by the Constitution to borrow money. The annexation of the legal-tender quality to notes issued in evidence of loans to the State was an acknowledged attribute of sovereignty in connection with the borrowing of money, and a common practice of foreign nations and of the American States before the adoption of the Constitution. It was therefore held that the power of Congress to impose the legal-tender quality on its notes was *in accordance with the prevailing custom of*

sovereign governments incidental to the general power to borrow money.

The application of this principle, in connection with the express power of Congress to regulate commerce among the several States, would certainly give Congress the power to regulate such commerce in the same manner, by the same means, and in the same particulars as the several States, in the exercise of their reserved sovereignty, regulate their domestic commerce. That State regulation bearing directly on the subject of discriminations, the reasonableness of rates and the amount of traffic charges generally is proper, constitutional, and within the power of the States in the regulation of their domestic commerce abundantly appears from the cases above cited. Legislation of Congress may therefore certainly provide for the same kind and extent of regulation. This and this only is what the act to regulate commerce does.

It may be added, too, that the creation of a commission for the regulation of interstate commerce seems quite as appropriate and plainly adapted to the exercise of the express power to regulate as the creation of a national bank of circulation was held to be in the exercise of other express powers of Congress. (See the celebrated case of *McCulloch* vs. *Maryland*.)

What we have now gone over, in regard to the length, breadth, and extent of the power of Congress over interstate commerce, establishes beyond doubt the following propositions regarding the character and extent of that power:

First. That as to interstate commerce this power of Congress is *plenary* and is absolutely unlimited, except

by the bounds which limit the powers of all free governments.

Second. That this power is *as full, absolute, and ample as is the power of the State legislatures to regulate commerce which is confined to the States, and where the State constitution imposes no limitation, except such as are imposed upon all free governments.*

Third. That this plenary power of Congress over interstate commerce is exclusive of the power of the States over the same subject-matter.

Fourth. That it extends to the regulation, not only of trade or intercourse in the commodities of commerce, but also to persons and property passing from State to State, and that, as to such commerce, either in persons or property, passing from State to State, it is not within the power of the States, either by the granting of charters to corporations or otherwise, to take away from Congress this exclusive power to regulate, not only the mere transportation of the elements entering into commerce, but also to regulate, control, or abolish, according to its pleasure, all the instrumentalities, facilities, obstructions, taxes, and other things, either in the nature of *aid* to or *obstruction* of such interstate commerce.

Fifth. That the control of rates can properly be exercised through the mediation of a commission such as is provided for by the act to regulate commerce.

POWER OF STATES OVER TOLLS, ETC., IN STATE COMMERCE.

It being so established, that the power of Congress over *interstate commerce is as unlimited as the power of the*

States over their own internal commerce, it becomes appropriate next to see what this court has held in regard to the *extent* of the power of State legislatures over the internal commerce of the respective States.

Before proceeding, however, to this view of the power of the States, it is proper to carefully observe the following points entering vitally into the reason of the matter now under consideration.

Our suggestions under this head we may state thus:

Since the power of the United States over interstate commerce is supreme, and exclusive of the power of the States over the same matter, and since the fact that Congress may not have entered upon the exercise of this power in any given case, but, on the contrary, is silent, does not *license* the State to legislate about it, but is a decree that such commerce shall remain free (see *Leisy* vs. *Hardin*, 135 U. S. R., 109–110), therefore if the power of Congress over interstate commerce *does not reach so far as to include the power to regulate freights and fares, then this immense proportion and part of our commerce is left without any power in any government to regulate it, or to touch it, in the way of forbidding excessive charges and burdens*, or otherwise.

If such power of protection and regulation as to interstate commerce is not possessed by Congress, then this reduction to the absurd results, that whilst, as to all internal commerce of the States, it is competent for the respective legislatures to protect it against extortion, obstruction, and oppression, yet as to all the inexpressibly large proportion of our commerce which is between the States (as this court has defined commerce between the States to be), it is abso-

lutely left in desolate orphanage, with no governmental power anywhere to either regulate or protect it.

It seems to us that this strange and absurd result is inevitable if there be indeed no power in Congress to regulate charges, etc., imposed by common carriers upon interstate commerce, and that the courts will hesitate long before they will permit their decisions to run into such anomalous and startling results.

With this premised, we now come to the direct question what powers the States have in regard to fixing rates of fare, etc., for their respective internal commerce?

From what we have said, it is plain, beyond all doubt, that if the States have power to regulate fares, etc., as to commerce confined to themselves respectively, then at least *that kind and extent* of power is possessed, as we have seen, by Congress.

In answering the question, what is the power, touching the matter of regulating charges for transportation, etc., of the States over their own commerce, not interstate in its character, it will not be needful for us to go over many of the decisions of this court, because in the "Railroad Commission Cases," decided, by this court in 1885 (116 U.S. R., 307), and which is a case where the matter received the most profound consideration, this right was most carefully considered and defined.

In this case the court held that the States not only possessed the power to regulate the charges upon State as distinguished from interstate commerce, but also held that—

> The right of a State to reasonably limit the amount of charges by a railroad company for the transporta-

> tion of persons and property within its jurisdiction can not be granted away by its legislature *unless by words of positive grant or words equivalent in law.*

In the body of the opinion by Chief Justice Waite, on page 325, the court is made to say:

> It is now *settled* in this court that a State has power to *limit* the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.

Citing—

> *R. R. Co.* v. *Maryland* (21 Wall., 456), *C. B. & Q. R. R.* v. *Iowa* (94 U. S. R., 155), *Peik* v. *Chicago & Northwestern Ry.* (94 U. S. R., 164), *W. & St. P. R. R.* v. *Blake* (94 U. S. R., 180), and *Ruggles* v. *Illinois* (108 U. S. R., 526, 531).

The court then proceeds in these words; regarding the present point:

> This power of regulation is a power of government, continuing in its nature, *and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent.*

In the case *Railway Company* v. *Minn.* (134 U. S. R., 418), this court, in the opinion by Justice Harlan, cites some of the cases in that court at pages 445 *et seq.*, and reaches the conclusion that the power in the States to regulate their own internal commerce is unquestionable.

But really this power of the States to limit and regulate the rates of charge upon their own internal commerce is not

more fully considered or more forcibly stated anywhere in the decisions of this court than in the three cases found in 94 United States Reports, which are reviewed in the case of the *Wabash, etc., Railroad Company* v. *Illinois* (118 U. S. R., 557), and which are also cited by this court in the case already quoted from the Railroad Commission Cases (116 U. S. R., 325). These three cases are—

Munn v. *Illinois* (94 U. S. R., 113);
Railroad v. *Iowa* (94 U. S. R., 155);
Peik v. *Railroad* (94 U. S. R., 164).

In the last-named case, at page 176, the court, by Chief Justice Waite, regarding the present point, states the law as follows:

> In *Munn* v. *Illinois* (supra, p. 113), and *Chicago, Burlington and Quincy Railroad Company* v. *Iowa* (supra, p. 155), we decided that the State may *limit* the amount of charges by railroad companies *for fares and freights*, unless restrained by some *comtract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter.* So far this case is disposed of by those decisions.

ACTS OF CONGRESS CONTROLLING INTERSTATE COMMERCE.

Again, whilst we have in mind no acts of Congress which *directly* undertake to deal with the charges upon freights and fares in interstate commerce enacted prior to this interstate-commerce act, and which have been by the courts recognized as valid legislation, we submit that much

of the legislation of Congress in regard to interstate commerce can not be sustained as valid, if the provisions of the interstate-commerce act here attacked as unconstitutional, are invalid.

Upon this point take for example the following acts found in the Revised Statutes:

Section 5258 embodies the act of June 15, 1866 (14 Stats. 66), and is a provision applying to all the States, and authorizing every railroad company whose roads are operated by steam to *carry upon and over its roads, boats, bridges, ferries, etc., all passengers, etc., on their way from one State to another, and to receive compensation therefor*, and to connect with roads of other States so as to form continuous lines for the transportation of the same to their destination.

This statute has been recognized as valid by this court in *Railway Company* vs. *Rich.* (19 Wall., 584.)

It will be observed that it deals with several of the most vital matters pertaining to the business and income of the railroads engaged in interstate-commerce and even expressly provides for *making compensation* for interstate transportation of freight and passengers.

Those who admit the validity of this legislation and deny the validity of the interstate-commerce act must be prepared to say that it *was* competent for Congress to ordain that *compensation should be made* for interstate commerce, but not competent to order that that compensation should be just, reasonable, or equal.

DECISIONS RECOGNIZING VALIDITY OF THE INTERSTATE-COMMERCE ACT.

In the very few cases, in the courts, where the provisions of the interstate-commerce act have been brought into view, the courts have, without hesitation or question, recognized the constitutionality of the law and the validity of sections 2, 3, and 22.

In the case decided in 1887 in the circuit court of the United States for the district of Oregon, *Ex parte* Keohler, opinion by Deady, J. (31 Fed. Rep. 315), the syllabus reads as follows:

> The fact that there is competition in the carriage of persons or property to or from a particular place is a circumstance that justifies the common carriers under section 4 of the interstate-commerce act to charge less for a long haul to or from the said place than the short one included therein.
>
> Section 2 of the interstate-commerce act in effect prohibits the giving of passes or free carriage to particular persons, and the exceptions allowed in section 22 in favor of officers and employés of the road does not include the families of such persons.

This syllabus is by the court.

In regard to the effect and operations of section 22 in this act in making exceptions to the provisions of section 2, requiring equality of charge, etc., the court, on page 321, says:

> "The third question propounded by the receiver is easily answered. Section 2 of the act, by prohibiting any carrier subject thereto from charging any one person "a greater or less compensation for any service" rendered in the transportation of persons

or property subject to the act than it does any other person for "a like and contemporary service, under substantially similar circumstances and conditions," in effect prohibits the issuing of passes or the carrying of any person free of charge, so long as the same privilege is denied to any other person "under substantially similar circumstances and conditions." Now, it may be said, and with *much plausibility*, that the wife or minor child of an employé sustains a different relation to the employer than that of the public generally; and that, therefore, the carriage of such a person on a pass, or free of charge, is a service rendered by the carriers under "substantially dissimilar circumstances and conditions" from that rendered to any other person not belonging to the family of an employé.

But section 22 of the act *contains some specific exceptions to the operation of section* 2. *Among them is this:*

"*Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés.*"

The language of the exception is explicit. There is no room for interpretation or construction. The words can not be made to include the family of an employé without violence to the apparent purpose of the legislature. In effect, the exception declares that the "circumstances" of a person being the employé of a railroad corporation is sufficient to justify the latter in carrying him free of charge, but not his wife or children. The exception takes the subject of free carriage on account of any person's employment by a railway corporation out of the question of "similar circumstances and conditions," as provided in section 2, *and*

declares that the person so employed may be carried on that account, without reference to any other circumstance or condition, and by a necessary implication no one else. Doubtless it would be expedient to include the immediate family—the wife and minor children—of the employé in this exception. By this means the corporation might, without material cost to itself or prejudice or injustice to anyone, augment in a graceful way the compensation and convenience of faithful servants. But the remedy, if any, is with Congress and not the courts."

This decision is one in point upon the very question we now consider, to wit, the constitutionality of the interstate-commerce act. It is also *vitally in point* upon other matters that we shall presently come to in regard to the construction of the act, upon which we shall, in the proper connection, hereafter comment.

In the case decided January 7, 1889, by Judge Jackson, the same judge who decided the case at bar (37 Fed. Rep., 567), is not only a recognition, but an express decision, affirming the constitutionality of the interstate-commerce act. It also passes upon several other questions which seem, by the defendant, to be made vital in its defense.

We select from the thirty-seven paragraphs of the syllabus, in this most elaborately considered case, the following as a just display of the character of the case and of the decision.

The second paragraph of the head note reads thus:

> The act to regulate commerce does not undertake either to create an "inferior court" or to invest the Commission appointed thereunder with *judicial powers* or functions.

The third paragraph is as follows:

> The Interstate Commerce Commission is invested with only *administrative* powers of supervision and investigation, which fall *far short of making it a court*, or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation *is neither final nor conclusive;* nor is it invested with any authority to enforce its decision or award. It hears, investigates, and reports upon complaints made before it, but *subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement of the order or report of the Commission in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto.*

The fifth paragraph is as follows:

> Congress under its sovereign and exclusive power to regulate commerce among the several States, *has the power to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce; and no valid constitutional objection can be urged against making the findings of the commission prima facie evidence in subsequent judicial proceedings.* Such a provision merely prescribes a *rule of evidence*, clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper functions.

The thirty-seventh paragraph is as follows:

> Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate in respect thereto, *to the same extent, both as to rates and all other matters of regulation, as the States*

> *may do in respect to purely local or internal commerce;* but the court is not called upon in the present case to say what would or would not come within this regulating power, for the existing law does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just; and it does not undertake to require a common carrier, subject to its provisions, to establish through routes and through rates with all connecting lines merely because it may have done so with one of them.

We shall have occasion in another connection to notice the bearing upon the present case of that part of it which relates to the matter of the decisions of this Commission being not final but only *prima facie* evidence relating to the merits of the case, and being, therefore, a mere *regulation as to evidence* permissible in cases to be carried to the courts.

In the case of the *United States* vs. *Tozer* (39 Fed. Rep., 369), decided in 1889, in the circuit court for the eastern district of Missouri, the validity of this interstate-commerce act was distinctly recognized and seems to have been unquestioned by the parties. There, amongst other things, it was held that—

> The fact that defendant's road *received much more traffic from the first shipper than from the second does not make the circumstances and conditions under which the two services were rendered substantially dissimilar.*

This doctrine we shall again come to.

Another case between the same parties came before the same court in September of the same year (39 Fed. Rep., 904), and in this case the validity of the interstate-commerce act was assumed and unquestioned.

This case also has bearing upon parts of the present case to which we shall presently come, and we therefore here set forth the propositions of law stated in paragraphs 2 and 3 of the head note, as indicating the kind and quality of charge and absence of discrimination here held to be required by the interstate commerce act.

This paragraph is as follows:

> 2. Section 3 of the interstate-commerce act, which declares it to be unlawful for a carrier to give "an undue or unreasonable preference" to any person, firm, corporation, or locality, or to subject any person, etc., to any undue or unreasonable prejudice or disadvantage "in any respect whatsoever," *does not refer solely to facilities afforded to shippers, but applies also to discrimination in rates.*

Section 3 of the head note is as follows:

> 3. Congress did not intend to leave carriers the power to grant undue preferences, or to subject persons or places to undue disadvantages, *by any devices, or by any adjustment of joint through rates with relation to local rates.* When two carriers establish a joint through rate, the proportion thereof that one carrier receives for carriage of property between two points on its line may be compared with its local rates between the same points, for the purpose of establishing that an unreasonable preference has been given, or that a shipper has been subjected to an undue disadvantage.

The case of *Cowan* vs. *Bond* (39 Fed. Rep., 54) was decided the 21st of May, 1889, in the circuit court of Mississippi. It fully recognized the validity of the interstate-commerce act.

In the case of *Baird* vs. *Railway*, decided 18th of March, 1890, circuit court for eastern district of Arkansas (41 Fed. Rep., 592), the validity of the interstate-commerce act, by Justice Caldwell, was fully recognized, and the court held, as stated in the third paragraph of the head note, that—

> The shipment of merchandise from one State to another is interstate commerce, and any requirement of the State statutes in respect of said commerce in conflict with the requirements of the *interstate-commerce act is not valid.*

The case of *Railroad Company* vs. *Dwyer*, reported in Southwestern Reporter (p. 1001), is another case where the court expressly recognizes the validity of the interstate-commerce act.

We have now gone over this question of the constitutional validity of the interstate-commerce act, both as to the force of the statute as a whole and also as to its provisions relating to the regulation of freights and fares generally, with a fullness which we feel *will be deemed quite superfluous*, because we think the validity of the act in these regards is not doubtful.

We have done this however, because of the stress which seems to be laid on this matter in the answer of the defendant; and also because, in this court, as applied to said interstate commerce act, the question may, in one sense, be set up anew; and for the further reason that the questions made by the answer are of supreme importance, and, if doubtful, ought to be settled by this court.

Other cases involving construction of the act to regulate commerce are:

Ex parte Koehler (30 Fed. Rep., 867).
Re Petition Texas and Pacific Ry. Co., (1 I. C. Rep., 30).
Cutting v. *Florida, &c., Co.* (30 Fed. Rep., 663).
Connor v. *Railway Co.* (36 Fed. Rep., 273).
Re Petition Nelson Morris (40 Fed. Rep., 101).
Little Rock &c., R. Co., v. *St. Louis, &c., R. Co.* 41 Fed. Rep., 559).
U. S. v. *Morsman* (42 Fed. Rep., 448).
Oregon Short Line v. *Northern Pacific R. Co.* (3 I. C. Rep., 205).
U. S. v. *Mich. Cent. R. Co.* (43 Fed. Rep., 26).
U. S. v. *Cleveland, &c., R. Co.* (3 I. C. Rep., 290).
Re Counselman (3 I. C. Rep., 326).
Re Peasley (3 I. C. Rep., 333).
Bullard v. *Northern Pacific R. Co.* (3 I. C. Rep., 536).
U. S. v. *Egan* (3 I. C. Rep., 582).
Riddle et al. v. *New York, &c., R. Co.* (3 I. C. Rep., 230).
See also *Minnesota* v. *Chicago, &c., R. Co.*, decided in Minnesota Supreme Court and reported 2 I. C. Rep., 519.

ALLEGED INVASION OF PRIVATE PROPERTY RIGHT.

We now turn to the other branch of the constitutional law which is raised by the answer. The question is whether the order of the commission in this case is one which, if executed, invades the rights of the defendant as secured to it by its charter and by the laws of the States in which its lines lie.

The answer of the defendant does not plead specifically either the terms of its charter or of the statutes to which it alludes, and, therefore, as a pleading, it would be bad under the general law.

But let it be *assumed* that the charter and laws alluded to in the answer do attempt to secure to the defendant an *unlimited* right and discretion to regulate its own charges for fares and freights generally, and without excluding from that right interstate commerce carried by it; so assuming is the law which undertakes to regulate the defendant's charges on interstate commerce an invasion of any property rights created by said grants in the charter? We submit that it is not.

Let us first consider this last question in the light of reason.

We have seen by a uniform and long line of decisions, by this court, that the power of Congress over interstate commerce is not only supreme, plenary, and unlimited, but that it absolutely *excludes* all power in the States to make any laws or grants which shall, as against that power of Congress, either modify, or change, or hinder, or interfere with this constitutional power so resting in Congress to legislate whenever it may please in regulation of said commerce.

We have further seen that where Congress allows its power, in this regard, over any particular subject-matter belonging to interstate commerce, to lie dormant and to be wholly unexercised, such fact does *not* license the State to make any laws regarding that particular subject-matter, but is a fact that renders that commerce free and untrammeled (*Leisy* v. *Harding*, 132 U. S., 109–110).

This being the unquestionable state of the constitutional law upon this point, as established by this court, it becomes simply self-evident that any charter or statute of a State that undertakes, by contract or otherwise, to grant away the power of Congress over any branch or part of this interstate commerce, and to secure perpetually to a corporation the right to tax that commerce at its pleasure, is simply and absolutely void.

If, therefore, the charter, or the laws of the State, did, in express words, undertake to confer upon the defendant, in perpetuity, or otherwise, the right to fix the rate of its own fares and freight upon the part of this commerce that was interstate, such provision would be void.

Such legislation may, under certain conditions, become valid and binding, as a contract *between the State and the grantee of such rights*, and irrevocably by the State because amounting to a valid contract—this where the grant is *confined* to commerce within the State, but *never* where it undertakes to grant such rights as to interstate commerce.

This court has, as we have seen, intimated that it is at least doubtful whether, as against itself, a State can grant away such power to regulate fares, etc., on its own internal commerce, because that is a governmental power ordinarily inalienable. This doubt is found expressed at the bottom of page 325 (116 U. S. R.), Railroad Commission cases, which we have already quoted, where the court says, in speaking of the power to grant away the power of control over State commerce:

> This power of regulation is a power of government, continuing in its nature, and *if it can be bar-*

gained away at all, it can only be by words of positive grant, or something in law equivalent.

But, surely, between the State and its grantee, on the one hand, and the United States, this transcendentally important and supreme authority of Congress over interstate commerce can not be bargained away by the States.

On manifest principle, therefore, aside from any authorities other than those we have gone over, the contention of the answer that this order, Exhibit D, is an invasion of private property rights is wholly untenable.

In the recent and excellent treatise by Morawetz on Private Corporations, at section 1075*a*, is a compact statement, together with a useful collection of authorities in support thereof, which has important bearing upon this question as to when even as between a State and its immediate grantee, there will be held to be an irrevocable and unchangeable contract right for controlling rates of fare and freight embraced in the charter or grant.

This statement is as follows:

> SEC. 1075*a*. It is well settled that a contract on the part of the State not to exercise its power of legislation can never be implied. Accordingly, the Supreme Court held, in *Stone* v. *Farmers' Loan and Trust Company*, that a railroad company did *not acquire an exemption from the power of the State to regulate its charges for transportation by virtue of a provision in its charter that "it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad.*"
>
> Chief Justice Waite, delivering the opinion, said: "It is now *settled* in this court that a State has power

to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter or unless what is done amounts to a regulation of foreign or interstate commerce. This power of regulation is a power of government continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power. * * * The claim now is that the State has *surrendered* the power to fix a maximum rate for this company and has declared that the courts shall be left to determine what is reasonable, *free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently all the power which the State had in the matter before the charter it retained afterwards.*"

A similar conclusion was reached in the construction of a charter which contained a provision "that the president and directors be, and they are hereby, authorized to adopt and establish such tariff of charges for the transportation of persons and property as they may think proper, and the same to alter and change at pleasure."

It will be observed in regard to this that the language of the charter in the case cited (*Stone* v. *Farmers' Loan and Trust Company*, 116 U. S. R., 307) *is in exact substance the same right over fares which is alleged in the answer, to wit, "that it shall be lawful for the company hereby incor-*

porated from time to time to fix, regulate, and receive toll and charges by them to be received for transportation of persons or property on their railroad."

See the similar provisions in favor of defendant set out at page 22, folio 50, of the Record.

And this court held, in the said case of *Stone* v. *Farmers' Loan and Trust Company* (116 U. S. R., 307), that the grant, couched in said words just quoted, did not deprive the State of its power within its limits to act upon the reasonableness of the tolls and charges so fixed and regulated.

If, therefore, this alleged "property right," set up in the answer at folio 50, were set up in a controversy *between the State itself and the defendant*, it could not prevail against the State, notwithstanding said charter, to regulate the tolls so as to make them just and reasonable. *A fortiori*, it can not be set up against the legislation of Congress in the exercise of its supreme power over interstate commerce.

The authorities cited by the author in section 1075*a* are, amongst others, the one last named; also *Commissioners' Cases* (116 U. S. R., 347–352), *Ruggles* v. *Illinois* (108 U. S. R., 526), *Ruggles* v. *People* (91 Ill., 256), *Railway* v. *Illinois* (108 U. S. R., 541), *Railway* v. *People* (95 *Illinois*, 313), *Railroad* v. *Smith* (70 Georgia, 694), and *Railroad* v. *Steiner* (61 Alabama, 559).

The case of *Railroad Company* vs. *Smith* (70 Georgia), above referred to, afterwards came on appeal to the Supreme Court of the United States (128 U. S. R., 180), where the judgment was affirmed. The question presented by the case was briefly this: The charter of the railroad com-

pany, enacted in 1833, provided that the company might make charges not exceeding certain specified amounts for the transportion of certain specified articles. The railroad commission of the State of Georgia, in pursuance of an act of 1879 of that State, prescribed rates for the transportation of freight over the railroad less than the maximum rates authorized by its charter as above stated. This action on the part of the commission was claimed by the railroad company to be in violation of its charter rights.

Justice Field, delivering the opinion of the United States Supreme Court, which was unanimous, said concerning the rights and duties of the company:

> The obligation assumed by the acceptance of its charter, to transport all persons and merchandise upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents and for the convenience of the public, but also to prevent extortion by unreasonable charges and favoritism by unjust discriminations. This is not a new doctrine, but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the Government, the better to secure the purposes to which the property is dedicated or devoted affected with a public use.

In respect to the clause of the charter fixing maximum rates it was said:

> It would require much clearer language than this to justify us in holding that, notwithstanding any

> altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated.

On the same matter the same author quotes as follows from the opinion of Chief Justice Waite in *Chicago Railway* v. *Iowa* (94 U. S. R., 161):

> Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers in order that they may better serve the public in that capacity. They are therefore engaged in a public employment affecting the public interest, and, under the decision in *Munn* v. *Illinois, subject to legislative control as to their rates of fare and freight*, unless protected by their charters. * * * *This company in the transaction of its business has the same rights and is subject to the same control as private individuals under the same circumstances.*

To this the author cites—

> *Peik* v. *Chicago, etc., Railway* (94 U. S. R., 164).
> *Chicago, etc., Railway* v. *Ackley* (*id.*, 179).
> *Winona Railway* v. *Blake* (*id.*, 180).
> *Stone* v. *Wisconsin* (*id.*, 181).
> *Laurel Fork Railroad* v. *West Virginia Transit Company* (25 W. Va., 324).

And we have seen from the authorities just cited in support of said section 1075*a*, what it is that will protect a corporation by means of the grant contained in its charter against the State's control over fares.

Without further mulplication of authorities on the present point, which might be added to indefinitely, we sub-

mit that there is absolutely *nothing* in the defendant's point that it is protected against the legislation of Congress by the grants contained in its charter.

INTERSTATE ACT SECURES JUDICIAL TRIAL.

There is still another constitutional point made in the defendant's answer in resistance of the validity of the order, Exhibit D. That is the one stated on page 22, folio 50, where the answer submits that these private property rights, so set up in the answer, are—

> Subject only to the decision of the *judiciary* department of the said National Government respectively upon the reasonableness of the rates so fixed; that the question of the reasonableness of respondent's rates of charge is a purely judicial question, and no *arbitrary rules* can be laid down therefor by the Congress of the United States or by the legislature of any State.

The interstate-commerce act has not attempted to lay down "arbitrary rules" fixing the rates of charge, but only the rule that they shall be equal under the same conditions.

But we have already seen that Congress has power, by itself, as to interstate commerce, to regulate freights and fares to the same extent as the States have as to their internal commerce. It is, therefore, a pure assumption for defendant to say that Congress has no power to lay down an arbitrary rule as to freights and fares on interstate commerce.

But this is aside from the direct point now under consideration. The point is whether, as to what is reasonable,

the defendant has the right to have the court, instead of the commission, determine what is reasonable?

Now the manifest answer to this point is that this law gives to the defendant the absolute right to have the court determine what is reasonable as against the *prima facie* effect given by the statute to the finding of the commission. That this perfectly meets and satisfies the right of the defendant to have the courts determine on the reasonableness of its fares is not only quite plain, but is, moreover, settled by the authorities.

One authority deciding this point directly is that already cited from the opinion of Judge Jackson from the case of *Bridge Company* v. *Railway Company* (37 Federal Rep., 567), fully cited above.

Again, it is quite evident that *if* a statute making provision for a preliminary trial before a commission or a court not endowed with certain constitutional powers (no odds what) as to which a citizen is entitled to have the judgment of a court, and where that statute provides for an appeal or review of the commission's decision by a *real* court having power to satisfy all constitutional requirements, is a valid statute because of *its giving such right of appeal*, then the interstate-commerce act is, in the respect now under consideration, a valid law.

For example, if a statute, in a State where a *jury* is required to assess the value of property taken under the right of eminent domain, providing for an assessment by a commission in the first instance, but also providing for an appeal to a court having a jury, is a statute where the assessment by the commission *would be valid* in the absence of an appeal to the court, then, *equally*, would the order

by the commission in this case be valid, because the right of appeal, as against the order of the commission, is here expressly and fully given.

That such legislation is valid is fully and overwhelmingly established by the authorities.

Take, for example, the case of *Reckner, etc.*, vs. *Warren Warner* (22 Ohio St. Rep., 275). There the court on this point holds as follows:

> The constitutionality of laws subjecting unwilling parties to a trial before magistrates, without the right to a jury, has been questioned in many States, *but it has been held in every instance that the right of appeal to a court where trial by a constitutional jury may be had validates the laws referred to; that the legislature may, in its discretion, impose conditions upon such right of appeal, which, although troublesome, inconvenient, and often to be regretted, will be sustained unless they are so onerous and unreasonable as manifestly to impair the right; that the requirement of a bond for costs, and the prosecution of the appeal, does not so impair the right, and is valid.*

Citing—

Emerick v. *Harris* (1 Binney, 416).
McDonald v. *Schell* (6 S. & R., 240).
Biddle v. *Commonwealth* (13 S. & R., 405).
Beers v. *Beers* (4 Conn., 535).
State v. *Brennan's Liquors* (25 Conn., 278).
Curtis v. *Gill* (34 Conn., 54).
Jones v. *Robbins* (8 Gray, 329).
Hapgood v. *Doherty* (8 Gray, 374).
Keddie v. *Moore* (2 Murphy (N. C.), 41).
Wilson v. *Simonton* (Hawkes (N. C.), 482).
Steamship Company v. *Foster* (5 Ga., 208).
Murford v. *Barnes* (8 Ga., 444).

State v. *Beneke* (9 Iowa, 203).
Deaton v. *Polk* (9 Iowa, 594); and
Norton v. *McLeary* (8 Ohio St., 205).

But it may be suggested that the case of *Railway Company* vs. *Minnesota* (134 U. S. R., 418), which held that the interpretation put upon the statute of that State, which provided that the rate of charges for transportation of property recommended and published should be final and conclusive as to what was reasonable, held that *such an interpretation* of the act gave it an unconstitutional effect, because it rendered the decision of the commissioner final and deprived the citizen of judicial inquiry as to what was reasonable.

It will be seen by what is stated, at the conclusion of the opinion by Justice Blatchford (p. 458), that it was the "*interpretation*" of the act depriving the citizen of a judicial determination of what was reasonable, and not the act itself, which the court condemned, and that the court, *therefore*, sent it back, after reversing the court below, for another trial, with this remark as to the reason for sending it back:

> In view of the opinion delivered by that court (of Minnesota) it may be impossible for any further proceedings to be taken there than to dismiss the proceeding for a mandamus, *if the court should adhere to its opinion* that under the statute it can not investigate judicially the reasonableness of the rates fixed by the Commission. Still, the question will be open for review.

From this statement alone it is perfectly manifest that had there been provision for review, as there is in the interstate-commerce act, or had the court changed its opin-

ion and held that the statute allowed a judicial review, the court would have held the law valid. It was perfectly useless to send the case back to the court below if *no change* in the holding of the court as to the meaning of the statute would be of avail to make the statute and the decision thereunder valid.

The same explanation of this decision given in 134 U. S. R., 418, is found in the case *In re Rahrer* (140 U. S. R., 563). There it will be seen that this court explains that the reason why it sent the case back for a new hearing was that this court regarded itself as bound by the decision of the State court upon its own statute, and indicates that if the court had held the statute to allow a judicial decision as to what is reasonable, as is done in the interstate-commerce act, then this court would have held the law valid.

Taking these two cases together, therefore, including the explanation in the case *In re* Rahrer, as found on page 563, they amount to a decision that where the statute gives the right of review, in a court, of a decision like this by the Commissioner, there the *first* decision is valid in the absence of an appeal.

What has been now gone over covers, we believe, all the constitutional questions attempted to be raised by the answer; and here we leave that part of the case with confidence that there is no part of this interstate-commerce law that is amenable to the objection that it is unconstitutional, and, further, that no interpretation put upon the act by the Commission is amenable to any constitutional objection raised by the answer.

THE MAIN ISSUE.

We turn now to the main question in the present case, namely, whether the Commission, in reaching the order, Exhibit D, rightly interpreted the interstate-commerce law, and whether that order is valid.

We insert herein, in the appropriate connections, the sections most brought into view, and in an appendix the material sections of the English acts on the subject of the regulation of tolls.

PAROL EVIDENCE, ITS OFFICE AND WHAT IT SHOWS.

Before entering directly upon an analysis of the provisions of the interstate act here brought into question, it will be appropriate to notice the bearing upon the case of the oral testimony found in the record.

Of course, upon the single issue which this record presents, to wit, as to the *meaning* of the statute, this oral testimony can have no place in the discussion or determination of the case, except as it may aid in the interpretation of any doubtful language in the statute requiring interpretation. To what extent oral testimony is permissible in aid of the construction of such doubtful language in the statute is quite familiar law, and has in multitudes of the cases in this court been laid down.

If, for example, the words "mileage tickets," or the words "excursion tickets," or the words "commutation passenger tickets," as found in section 22 of the act, are "*clearly*" (96U. S. R., 113) shown to be known and recognized "terms of a trade or business"—as, for example, of commerce—and if these words at the date of the passage

of the act are *clearly* shown to have *then* had a definite signification as terms of commerce, then it will be presumed that Congress used these words in the sense and meaning which they are shown to have had at said date; this, unless they are shown to have had a different popular meaning generally understood.

On this general rule of interpretation Endlich on the Interpretation of Statutes, section 33 (edition of 1888), says:

> A statute applicable to a large trade or business should if possible be construed not according to the strictest and nicest interpretation of the language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing. * * * Hence the definition of an article of commerce by merchants and importers when it is *clearly* established determines the construction of a tariff law in which that article is mentioned.

Citing:

> *Arthur* v. *Morrison* (96 U. S. R., 108.)
> *Curtis* v. *Martin* (3 How., 106.)

The author adds in the same section:

> The rule, however, works *both* ways; and whilst it *includes* what is commonly covered by the commercial sense of the term, it *excludes* what is not so covered. Thus it was held that in order to permit the entry of a certain article under a certain denomination it must have been previously known by that name in commerce.

Citing:

United States v. *Sarchet* (Gilp., 273.)

The formulated statement of this rule of interpretation as found in *Arthur* v. *Morrison* is in these words:

> The designation of an article of commerce by merchants and importers, when it is *clearly* established, determines the construction of the tariff law when that article is mentioned.

And this rule is found in *United States* v. *One Hundred and Twelve Cases of Sugar* (8 Pet., 277); *Elliot* v. *Swartwout* (10 Pet., 137); *Curtis* v. *Martin* (3 How., 106); *Arthur* v. *Lathey* (96 U. S. R., 112); *Greenleaf* v. *Goodrich* (101 U. S. R., 278).

This rule has the explanation or qualification which is thus stated by this court in *Schnieder* v. *Barney* (113 U. S. R., 647, 648).

> Undoubtedly the language of tariff acts is to be construed according to the commercial signification, *but it will always be understood to have the same meaning in commerce that it has to the community at large, unless the contrary is shown.*

Swan v. *Arthur* (103 U. S. R., 598).

The result of these authorities, as applied to the present case, seems to be, therefore, this, that in order to make the parol evidence in this record of avail, in aiding in the interpretation of any of the terms used in the interstate commerce act, the terms must be *clearly* shown to have been known and *used* at the date of the enactment of the said law *as technical words of the art, profession, or business of commerce, and to have had a known signification,*

recognized by persons engaged in railroad commerce. This appearing, the court will give to the technical words the sense which they had in commerce.

With these rules of law, applicable to the parol evidence in the case, we turn to the record for a condensed presentation of some extracts going to show that the statement of Justice Sage, already quoted (Rec., 116, fol. 248), is accurate where he says:

> A question was made whether these tickets ("party of ten tickets") were known and recognized in railroad circles before and at the date of the passage of the act as commutation tickets. The evidence of railroad men of experience and prominence was taken upon this point. *It clearly establishes the negative of the proposition.*

At folio 176, *L. P. Farmer*, general passenger agent of the New York, Lake Erie and Western Railway Company, swears that, prior to the enactment of the interstate-commerce law, the word "commutation" as applied to railroad tickets did not include what were known as "party-rate tickets;" that party-rate tickets" are classed as a *distinct* form of transportation, and that "party-rate tickets" were not embraced in the term "commutation" prior to April, 1887.

George H. Daniels, general passenger agent of the New York Central and Hudson River Railroad Company, and who was commissioner to adjust passenger rates for one of the western associations, on this point, at page 89, folios 187–188, swears that at and before April, 1887, the date of the passage of the interstate-commerce act, commutation tickets were known, and that at that date party-rate tickets were

to some extent in use in the West for theatrical troupes etc., but that these were not known as coming under the name of or belonging to the class "commutation tickets."

George R. Blanchard, chairman of the Central Traffic Association, at page 97, folios 203, 204 of the record, swears that at the date of the enactment of the interstate-commerce act, in April, 1887, there was a custom amongst railroads of issuing to parties traveling from station to station in one direction a single ticket, and during the same time a custom of issuing what were called "commutation tickets," and he swears in regard to these two classes in these words:

> In my judgment they were distinct and separate forms of ticket. * * * Strictly speaking, the commutation ticket is one by means of which one and the same person, or the members of one family, can travel between stated points daily or at regular periods during a specified period at reduced rates of fare, made public and to be availed of by anyone who conforms to their rules of issue. Per contra, one-way party-rate tickets had nothing of the characteristics of commutation rates, being for regular travel of unknown numbers of persons, at or above the minimum number, between points often outside of commutation limits, and which points varied with the pleasure of the parties traveling one way, such as theatrical troupes, for illustration, going between New York and Elmira, between which points there were no commutation tickets. One-way party rates also differ from excursion tickets, the latter being to parties both ways instead of one. I should say, therefore, that one-way party-rate tickets were, and now are, considered a distinct class of travel apart from commutation travel.

Lucius Tuttle's business was the passenger business, but now is general manager of the New York, New Haven and Hartford Railroad. On page 101, folios 213, *et seq.*, he testifies that prior to and at the date of the passage of the interstate-commerce act, there was a custom by which railroads issued one ticket at reduced rates to persons traveling in one direction, and that these were called either "special-rate tickets" or "party tickets;" that at the same time the roads with which he was acquainted in New England used what were called "commutation tickets," and that they were *not* of the same class.

E. A. Ford, general passenger agent of the Pennsylvania lines west of Pittsburg, on page 27, folios 60–61, swears that there was a custom on the roads of which he knew of issuing a ticket to numbers of persons traveling in one direction from station to station; that they were called "one-way party tickets." He distinguishes these from commutation tickets (Rec., p. 28).

At the middle of page 28 he says:

> Commutation tickets, in the ordinary acceptance of the term, are *special and distinct forms of ticket of themselves*, used by commutors who live near large cities, and sold at very greatly reduced rates, * * * and in our custom and practice, as they have been regarded by me and men under me, in my experience, they constitute an *entirely different* and distinct class of tickets from the so-called "one-way party-rate tickets."

This witness was examined at considerable length, his testimony extending from page 27 of the Record to page 37, inclusive.

The substance and effect of the entire testimony will be found embodied in the question and answer on page 32, where, speaking of the various classes of tickets, Mr. Ford says:

> Q. Aint it a fact, Mr. Ford, that the business principles upon which all these tickets were issued were *substantially the same?*
>
> A. *No, sir;* the exception is the one-way party-rate tickets, made for a special purpose, and generally to move theatrical troupes at a lower rate than ordinary people. It was substantially for that.

Then, after explaining that they did not give party-rate tickets to business men generally coming in a party, but only to theatrical companies, he says:

> I make the point of distinct *difference* in my mind as *between commutation tickets, excursion and thousand-mile tickets, and one-way party tickets as applied to our business prior to the passage of the act.*

It would unnecessarily extend this brief to attempt an analysis of the evidence of the witnesses for the defendant. If this is required at all it can best be done in the oral argument.

We call attention, however, to the statement of Mr. McCarty, who said (p. 66), "A party-rate ticket has not been technically classed in railroad parlance as a commutation ticket," and to that of Mr. Taylor, page 113, who testified that when his company made use of party-rate tickets they "did not include them in the designation of commutation tickets," and that this was true at the time of the passage of the Interstate Commerce law.

It will be seen by that analysis, when made, that *not one* of the witnesses for the defendant undertakes to

testify that *as a matter of fact* party-rate tickets were known, as a technical word of commerce, at the date of the passage of the interstate-commerce act and recognized by commercial men or by the public generally as belonging to either of the three classes of tickets named in section 22 as excepted from the provisions of the act.

The witness who seemed the most anxious to so testify was William B. Shattuc. It will be seen by the Record that this witness represented the Ohio and Mississippi Railroad Company. It will also be seen at page 45, folio 98, and at other places, that that witness at the time of testifying was, as the agent of said railroad, *in use of party-rate tickets for ten persons or more.*

If the exposition of the law as set forth in Exhibit D is sustained this witness admits himself a *criminal,* subject to the severe penalties of the law. He therefore testifies under the powerful bias of one testifying for his own safety. But even he nowhere distinctly swears to what is the only material fact in the case, viz, that *as a matter of fact,* as distinguished from his own judgment or opinion, "party-rate tickets were," at the date of the act, known and recognized among commercial men or the people as technical words of commerce or as belonging to either of the three classes named in section 22, or to the fact that either of the three classes named in section 22 were known and recognized, either by commercial men or by the people generally, as taking in and embracing "party-rate tickets."

This witness does swear, vehemently, that in his *opinion* party-rate tickets and all the low-priced tickets

named in section 22 *properly belong* to the class "commutation tickets."

None of the other witnesses for the defendant fully sustain Mr. Shattuc. These other witnesses for defendant are Ernest O. McCormick (Rec., p. 52), O. P. McCarty (Rec., p. 63), Frank W. Sanger (Rec., p. 73), Joseph Arthur (Rec., p. 77), James C. Duff (Rec., p. 79), and James L. Taylor (Rec., p. 108).

Of these persons, McCormick, McCarty, and Taylor were "railroad witnesses." McCarty and Taylor, as we have seen, sustain the contention of the appellant. McCormick was only a local passenger agent at the time the law was passed and had never attended but one meeting of passenger agents, and his testimony, if it proves anything, shows that the "party-rate" ticket was of a separate class of ticket from the other recognized classes.

Sanger, Arthur, and Duff were "theatrical managers," who reside in New York, all of whom, however, it will be observed, are connected with the very large companies, and who have no personal acquaintance with the transportation of so small a number as but ten persons.

Their testimony may be summed up as of the purport that the theatrical companies such as they represent can not profitably be conducted if they are charged the same fare that is charged to other persons, but that they can be conducted at a profit if a party rate is accorded to them. This means nothing more or less than that the profit in the business is the saving in transportation over the fares as paid by the world at large. There is no sufficient reason why the carriers should be taxed to pay a profit to

this particular business, any more than they should be taxed to pay a profit to any other business.

But the testimony of these gentlemen is important as bearing upon the accepted meaning of the particular phrase under consideration here, because they all agree that after the passage of the interstate-commerce law the railroad companies, almost without exception, placed such a construction on the meaning of the law as to prevent them from issuing party-rate tickets.

None of these witnesses attempt to testify to the *only* really material and competent fact embraced by their testimony, to wit, that *as a matter of fact the three classes of tickets named in section* 22 *were, amongst the men of commerce, known and recognized at the date of the passage of the interstate-commerce act as existing and used in commerce, and that they, or either of them, embraced party-rate tickets, or that party-rate tickets were known and recognized as embraced in either of the three classes of tickets named in section* 22.

It must be kept in mind that a mere *preponderance* of evidence is not enough to fix upon words a known technical signification which will be accepted as aids to the court in an interpretation, but such sense must be "*clearly*" established. In this case it would be preposterous to assert that these party-rate tickets are clearly shown to have come within either of the three classes designated in section 22.

We start, therefore, in the discussion of the question of the *meaning* of the words designating the three classes of

tickets named in section 22 with the negative fact established, which is stated by Justice Sage in the following words:

> A question was made whether these tickets were known and recognized in railroad circles before and at the date of the passage of the act as commutation tickets. The evidence of railroad men of experience and prominence was taken upon this point. It clearly establishes the *negative* of the proposition.

And we say of this extract from the opinion that it is unquestionably a just statement of the aggregate effect of the testimony in the case. We say, moreover, of the aggregate effect of this testimony that it does show that, at the date of the passage of the said act, the three classes of tickets named in section 22, and also "party-rate tickets," had existed and were known among commercial men and the people as existing forms of tickets in use, and that each of the four species of tickets belong to *different classes;* and the most earnest witness for the defendant in effect admits this at different places. (Rec., p. 45.)

It is proper to add, in this connection, in regard to the above quotation from the opinion of Justice Sage (Rec., p. 116, bottom), where he says that the evidence of the railroad experts "clearly" establishes the negative of the proposition that these party-rate tickets were known and recognized in railroad circles before and at the date of the passage of the interstate-commerce act as commutation tickets, that it does not seem to have been concurred

in by Justice Jackson in his concurring opinion in the case, for he says (folio 274)—

> Our conclusion on the first question presented is that said "party-rate tickets," as used by the defendant, are commutation passenger tickets within the true meaning of section 22 of the act to regulate commerce.

Still, this statement by Justice Jackson probably only means that the judges so concluded that party-rate tickets were commutation tickets from their interpretation of the statute, independently of the oral proofs, and not that this was the effect of such proof.

THE BURDEN OF PROOF.

Plainly, the determination of the question whether two kinds of traffic are conducted under similar circumstances and conditions is a question of fact.

And it is well settled that the question of reasonableness of a rate and the fact of its being discriminating or otherwise is a question of fact.

Colliery Co. v. *Manchester* (3 Nev. & McNam., 441).
Denaby v. *Same* (11 App. Cas., 97).
Samuels v. *L. & N. R. R.* (31 Fed. Rep., 58).
U. S. v. *Tozer* (2 I. C. R., 540).
Harper Law, Interstate Com. (66–68), and cases cited.

The court below, in passing upon the questions involved in the case, ignored that provision of the interstate commerce law, to be found in section 16, which provides that the report and findings of the Commission in a case brought under that section shall be considered *prima facie* evidence.

The case, therefore, stood with the burden of proof upon the defendant, to show either that the party-rate tickets were in fact commutation tickets, or that the rates were not discriminatory, but just and reasonable, and that the service rendered to each class of passengers was not "substantially similar."

The court below gave as one reason for deciding as it did, that "the burden of showing that the difference in defendant's party and single-passenger rates constitutes some undue preference," was upon the appellant.

This was manifest error. The law places the burden of proof upon the defendant.

As we have seen above, the defendant failed utterly to show that these party-rate tickets were understood to be "commutation tickets."

The defendant attempted to prove, however, that the same business considerations which induced a carrier to issue commutation tickets induced it to issue party-rate tickets, but herein the failure is quite as conspicuous as upon the first proposition; it was only shown that the inducement for issuing the latter tickets was the fact that they were formerly universally (and now practically only) used by amusement companies, and for the reason that their issuance stimulated travel from among the suburban population to the cities where the companies exhibited.

The law does not authorize a lower rate to be fixed on account of a "business" reason so remote as this.

Besides, this reason is more nearly allied to the reasons back of the policy of issuing excursion tickets rather than that back of "commutation tickets."

A careful review of the whole testimony fails to disclose any evidence upon the subject sufficient to overcome the *prima facie* case established by the incorporation into the case of the report and decision of the Commission.

SECTIONS OF THE STATUTES.

As a matter of convenience we here insert sections 1, 2, 3, and 22 of said interstate-commerce act.

The first part of section 1 is devoted to defining what it is that is embraced within the purview of the act. It then concludes in the following words:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Section 2 of said act is as follows:

> SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similiar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3 of said act is as follows:

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Section 22 of said act is as follows:

SEC. 22 (*as amended*). That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from

giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act.

ANAYLASIS OF SECTION 2.

Turning now to section 2 of the act, considering it by itself, and disassociated with section 22, our first inquiry is whether that act requires such equality of charges for transportation as is violated by issuing one ticket to a party of 10 or more, for one trip, at rates about one-third less than is charged to the rest of the community, as per published rates; the fact being, however, that there is, at least nominally, tendered to all alike the right to purchase such reduced party tickets.

INEQUALITY OF CHARGE UNLAWFUL EVEN THOUGH NOT EXCESSIVE.

In answering this question, it is proper to notice at the outset, and preliminarily, *one* of the grounds upon which

the court below based its conclusion that such party-rate tickets are not now unlawful.

We submit that one radical error in the principles laid down and conclusion reached by the court below as one of the grounds of its decision is in assuming that, if the compensation taken for transportation, made upon party-rate tickets, and also that taken upon single tickets, although the latter was in excess of the former, for transportation at the same time, in the same car, and for the same distance, as three to two, were each, respectively, reasonable and no more than fairly compensatory in themselves, considered by themselves, then there could be no violation of section 2.

This the judges below repeatedly, in substance, asserted, as we understand them.

For example: On page 132, near the bottom, Judge Jackson, in his opinion, states as follows:

> Now, it is neither claimed nor proved in the present case that the defendant's charges, either for single passengers or party-rate tickets, are in themselves unjust and unreasonable. On the contrary, both rates are shown to be just and reasonable. The public has, therefore, no ground of complaint on that score, nor has any legitimate complaint been made in its behalf by either the original petitioners or by the Commission.

Again, on page 133, speaking of how it could be that the rate is unjust or unreasonable, because more is charged *per capita* for single tickets than for party tickets, for the same service, the courts asks:

> But how can this proposition be sustained if, as we have already stated, both single passenger and

> party-rate charges in use by the defendant are in themselves reasonable and just towards each class of such traffic. When a carrier's charges are reasonable and just, in compliance with the requirement of section 1, how can they be regarded or treated as constituting an unjust discrimination under section 2, or an undue preference or undue prejudice under section 3 of the act.

It is plain, from such passages as this, which abound in both of the opinions below, that the case was, in a large measure, decided on the theory that if a rate of charge is reasonable as to each class, considered by itself—that is, if no more is charged than is fairly and justly compensatory—then there can be no violation of section 2; this apparently because there is no violation of section 1.

Stated in another way, the position is one which asserts that, if no more is charged against either class than is fairly compensatory, and section 1 is, therefore, not violated, no amount of inequality between the charges for the same service at the same time for passenger transportation can become a violation of section 2.

Stated in still another way, the position is one that asserts that mere *inequality* of charge can become no violation of this law, provided neither charge exceeds, or departs from, what is "just and reasonable," as required by section 1.

Now we submit that this proposition is not sound. Before introducing the authorities in establishment of the proposition just stated, that the position here taken by the court is not sound, it is proper to remark that it is a mistake to assume that charging one class of the people

for the same passenger service more than another class is not a case where either rival carriers, or one class of citizens are discriminated against and where, therefore, this law does not apply, because the discrimination injures nobody.

It is simply self-evident that all travel by passengers in the commerce of the country is looked upon by this law as equally lawful, as travel performed, labor done, in prosecution of the lawful business of life, and that all such travel is therefore to be regarded as having *value* not to be discriminated against or in favor of, any more than the travel of two rival carriers or the transportations of two rival traders. To assert the contrary of this is, in effect, to assert that this statute is not meant to protect the general *public* as such; is to assert that when two citizens travel together under precisely the same conditions in the same car, each upon the lawful business of his life, one may be charged double that of the other merely because they may not be (and their pursuits may not be) *directly* and technically, rivals in business; is to assert that neither the citizen so discriminated against, on behalf of himself and of the public, nor the commission itself, on its own motion, can interfere to put an end to the unjust discrimination; this because the discrimination is said not to be as between rivals.

It seems to us that this position taken below, in regard to the necessity of showing a case between what are known as technical rivals, before this law will apply for the suppression of unequal discrimination, is wholly untenable. Unequal taxation of lawful *travel*, done in the

lawful prosecution of lawful business, is as much an unequal taxation of rivals in commerce as it would be to tax the transportation of one citizen's flour in excess of another's.

PITTSBURG, CINCINNATI AND ST. LOUIS RAILROAD COMPANY A RIVAL.

There is another view in which the issuing of party-rate tickets by the defendant at lower rates than the schedule prices for single passenger tickets is directly and literally injurious to rivals in commerce.

As applied to the case at bar and to all other cases where competing carriers are concerned, this position of the opinions below that the issuance of party-rate tickets hurts nobody—no rivals—and hence no one who is hurt by such issuance has brought this case into court, and that none but those hurt have a right to complain (R. fol., 282) is one presenting, as it seems to counsel for appellant, a feat in the way of agility in logic which would be entertaining if, in its possible consequences, it were not so serious.

This case is brought into the Commission, and through it into court, by the action of the Pittsburg, Cincinnati and St. Louis Railroad Company; such company saying in its complaint that—

> I am hurt by the issuance of these party-rate tickets, because party-rate tickets are *unlawful* and therefore I decline to use them; but the Baltimore and Ohio is issuing them, and *that* is withdrawing from me my business, and, to that extent, destroying it.

Thereupon the court below makes reply, in legal effect, as follows:

> We, the court, conclude that party-rate tickets are lawful, *because* you are not hurt by their issue, and we further conclude that you are not hurt by their issue, because their issue is lawful.

The court first uses the fact the issuing of the party-rate tickets is lawful because there is no rival that is hurt thereby, and then uses the fact that no party is hurt thereby in order to prove that it is lawful.

This, as a specimen of circular reasoning and of gymnastics in legal logic, is quite respectable, at least for its novelty, but is not, we think, *safe* as a method of arriving at just results in judicial conclusions.

The fact is that if, indeed, the opinion of the Pittsburg, Cincinnati and St. Louis Railroad Company, as set forth in its petition, Exhibit A, is correct, that party-rate tickets are unlawful, and if it acted wisely in obeying the law, then the issuing of party-rate tickets by the Baltimore and Ohio becomes *directly, literally, materially, and unlawfully* injurious to the business of the rival road; and, unless the issuance of the party-rate tickets was so *clearly* lawful as to make it a plain act of *folly* for the Pittsburg, Cincinnati and St. Louis Railroad Company to desist from their issue, and to appeal to the court, and unless it be an act of *clear* right in the Baltimore and Ohio road to persist, *then this appeal to the courts for settling the question was not only justifiable and wise, but absolutely indispensable, in order to avoid the hazard of incurring the fearful penalties attached to the violation of the interstate-commerce law.*

In a case so brought into court by the rival road for the purpose of having this question of lawfulness or unlawfulness established in order to its own protection against the incurment of severe penalties for high crime, and in order to settle what the law is, in the interest of the public, and a case so brought nearly two years after a commission, appointed by law to decide this very question, composed of some of the most eminent lawyers in the land, and presided over by a judge regarded by the universal consent of the world as one of the most eminent, if not the very most eminent, expounders of the law now living, had, in effect, determined, in the case of *Smith* v. *Railroad Company* (1 I. C. C. R., 208, and Memorandum, 2 I. C. C. R., 649), that these party-rate tickets were unlawful, for the court below to assume, as it does, that party-rate tickets were lawful, amongst other reasons, because these party-rate tickets hurt no rival, and to further assume that no one complains who is hurt, and that, because no one complains in this case who is hurt, therefore this case is not properly brought into court, is, as it seems to us, a position wholly untenable.

We, therefore, leave this point, regarding the absence of rivalry in this case, confidently submitting that in both views now stated it is a case where "rival" interests are represented in a case properly brought in court, and where the alleged injury to rival interests is deeply involved, and where, moreover, what is still more important, the interests of the entire public are deeply involved.

SECTIONS 1 AND 2 CREATE DISTINCT OBLIGATIONS.

Another point must be here carefully kept in mind, because somewhat preliminary to what is to follow (but which will hereafter be more fully considered), namely, that section 2 of the act is one creating a prohibition and rule of commerce not embraced in section 1, prohibiting unreasonable charges, and that section 2 creates an offense that is not embraced in section 1.

The thing required by section 2 is *equality* in charges for like and contemporaneous service in transportation of persons or property.

By the provisions, therefore, of this section, to charge for the same service, contemporaneously rendered, unequal prices, is rendered unlawful, without regard to its being violative of the rule of justice and reasonableness of charge established by section 1.

This is the express letter of the law and presents a case where construction or interpretation is, as seems to us, necessarily excluded.

Still, we deem it best, in another connection, to look carefully to *this* question of the construction of the statute, as bearing upon this obligation of equality in charge.

Given, the fact that to one person for commerce subject to the act a charge is made variant from that charged to any other person, "for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic," that is, under "substantially similar circumstances and conditions," then such dissimilarity of charge becomes, by section 2, unlawful and prohibited.

It is therefore no answer to the proposition that party-rate tickets are prohibited by section 2, to say, or to show, that party-rate tickets are no more than just and reasonable and are merely fairly compensatory considered by themselves; but on the other hand if they, as contrasted with single tickets issued for doing for the passenger a like and contemporaneous service in transporting him under substantially similar circumstances and conditions, are in excess of what is charged for such single tickets, then that excess and discrimination makes them unequal within the sense of section 2, and unlawful, and renders them, moreover, unreasonable and unjust within the sense of these words in the interstate-commerce law.

To this, that inequality of charge for contemporaneous and like service under substantially similar conditions taken by itself is created an offense by section 2, although such unequal charges may be no more than fairly compensatory considered by themselves, we now proceed to give some authorities.

These authorities will be found to bear upon other propositions in appellant's case as well as upon this.

SOME OF THE CASES.

In the case of *Messenger et al.* v. *Pennsylvania Railroad* (37 N. J. Law, 531–534), the court considers this question in the light as well of the common law as of the duties of common carriers under the conditions of modern commerce, as established by our American authorities.

The head-note in that case is as follows:

> A common carrier owes an equal duty to all, and it can not be discharged if he is allowed to make unequal preferences and thereby prevent or impair the enjoyment of the common right.
>
> A contract of a railroad company which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of goods is unjust and can not be legally enforced.

In the opinion of the court, by Vedle, J., this rule of the head-note is stated in the following language:

> A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and therefore the carrier can not discriminate between individuals for whom he will render the service. In the very nature of his duty and of the public right his conduct should be just to all. So, also, there is involved in the *reasonableness* of his compensation the same principle. *A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust when the right to demand it is common.* It would be strange if, when the object of the employment is the public benefit and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals and for reasonable rates), that by the indirect means, unequal prices, some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and the refusal in effect could

> be accomplished by unfair and unequal charges, or, if not to that extent, the public right to the convenience and usefulness of the means of carriage could be partly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means established and intended for the public good to promote unfair advantages amongst the people and foster monopolies is against public policy and should not be permitted.

The irresistible force of this statement is unescapable. It establishes, if sound, not only our proposition now under consideration, that a charge which is not unreasonable because excessively high or excessively low may still be most unreasonable because in excess of what others are charged for a like service; and it also establishes, if sound, the error of what is said by the court at the bottom of page 132 and top of 133, namely, that nobody has a right to complain where both charges in question are just, considered by themselves, however unequal they may be, and however injurious to the party discriminated against.

The court (p. 535) proceeds:

> A common carrier owes an *equal* duty to all, and it can not be discharged if he is allowed to make *unequal preferences*, and thereby prevent or impair the enjoyment of the *common* right, and, as said by Sharswood, J., in *Audenried* v. *Railroad Company* (68 Pa. State, 370): "Transportation by a common carrier is *necessarily* open to the *public upon equal* and reasonable terms. An *exclusive* right granted to *one* is inconsistent with the rights of *all others*."

Chief Justice Appleton, in the case of *Express Company* v. *Railroad Company* (57 Maine, 196), also says: "The *very definition* of a common carrier excludes the idea of the right to grant *monopolies* or to give *special* and *unequal* preferences." In *Baxendale* v. *Railroad Company* (4 C. B. (N. S.), 63), two of the judges intimated a notion that *unequal* rates would not be contrary to the common law; but the same was mere *dictum*, foreign to the question at issue. Previous to that case, Smith, in his Leading Cases (4th ed., vol. 1, p. 174), had stated that "hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more *to one*, though a rival carrier, than to *another*, for the same service." That clause gave occasion for the intimation of the judges to the contrary in *Baxendale* v. *Railroad Company* (*supra.*) I find, in examining the last edition of Leading Cases (6th ed., vol. 1, p. 364), that the editors have substituted for the latter part of his sentence the words "though at common law there is no liability to carry at equal rates for all customers." The change, no doubt, was made under the force of the Baxendale case, *but in my judgment Mr. Smith was right in his statement.* The view now contended for has been learnedly considered and sustained by several of the cases in this country, *and must now be taken as the common-law doctrine in this State.* The following are the cases referred to: *New England Express Company* v. *Railroad Company* (57 Me., 188); *McDuffie* v. *Railroad Company* (52 N. H., 430); *Sanford* v. *Railroad Company* (24 Pa. State, 378; 1 American Railway Reports, 530); *Audenried* v. *Railroad Company* (68 Pa. State, 370).

The opinion then adds that:

> It must not be inferred that common carriers, in adjusting prices, can not regard the peculiar circumstances of the particular transportation.

This last suggestion is in accordance with the letter of section 2, for that requires that in order to compel the equality of charge, the service must be "like" service, and rendered contemporaneously and under "substantially similar circumstances and conditions."

We come presently to the question, whether taking two men or ten men at the same time in the same car over the same distance on *one* ticket, if *considered distributively as to each individual in the company* is a transportation under substantially dissimilar circumstances from the transportation of *one* passenger at the same time in the same car and over the same distance.

But *now* we are still upon the question whether, under section 2, a charge is not *unlawful* because *unequal*, although it is no more than compensatory.

In another case, between the same parties, decided in 1873, reported in 36 New Jersey Law, 407, the same doctrine is laid down as in the last preceding. The headnote is as follows:

> An agreement by a railroad company to carry goods for certain persons at a *cheaper* rate than they will carry under the same conditions for others is void, as creating an illegal preference.

The opinion in the case is by Beasley, C. J. In that opinion, after stating, by quotation from Sir William Jones, that this obligation of equality of treatment by

carriers, as well as the other peculiar responsibilities of carriers as founded in the consideration that the *calling is a public employment*, the court (p. 411) says:

> The law that forbids him to make *any discrimination* in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the *rate of pay* for the carriage. I can see no reason why, under legal rules, perfect *equality* to all persons should be exacted in the dealings of the common carrier *except* with regard to the *amount* of compensation for his services. The rule that the carrier shall *receive* all the goods tendered loses half its value, as a politic regulation, if the *cost of transportation can be graduated by special agreement so as to favor one party at the expense of others, nor* would this defect in the law, if it existed, be remedied by the principle which *compels the carrier to make a reasonable hire for his labor, because if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another, for similar services, this disturbs that equality of rates amongst his employers, which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge for precisely the same offices to another, I think it should be held that the higher charge is not reasonable, a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a presumption founded on the supposition that some other person is to be charged more than the law warrants.*

Now, in this extract from the opinion of the court is a forcible statement of how impossible it is that for precisely the same thing rendered to two different men by a

carrier he shall be allowed to charge one in excess of the other, without such discrimination becoming "unreasonable and unjust," when the very fact of the diminished charge of the one has, in the long run of trade and commerce, the effect of throwing the burden, to the extent of the diminution, upon the one charged in excess, this because, *in contemplation of* just law, it will be *implied* that the common carrier, for the entire aggregate of his service, is to receive a fair compensation, and no more. Therefore, in contemplation of law, it is impossible that both of these unequal charges should be reasonable.

The headnote in the case of *Railroad Company* vs. *People*, decided 1873 (67 Illinois, 11), indicates its character and the law it lays down. The second proposition of the headnote is thus:

> The rule forbidding unreasonable charges and unjust discriminations being a common-law rule, railroad companies, by accepting their charters, take them with this implied limitation upon the power granted in general terms to establish their rates of freight. Such charters are granted for the purpose of furnishing improved means of transportation and travel *to all persons alike*, without *unjust discrimination* between individuals or communities, and when accepted it is with a knowledge that the nature of the grant implied these obligations.

The third paragraph of the headnote is thus:

> Even conceding that the charters of railroad companies are contracts, the constitutional power of the legislature to prohibit *unjust discrimination in freights still exists*, and rests in the right of the legislature to prescribe the methods by which to enforce a common-

law duty that such companies voluntarily assume when they exercise the functions of a common carrier. Such legislation is in no respect a violation of their charter.

The fourth paragraph of the headnote is in these words:

> The establishment permanently of *less* rates of freight *at points of competition* with other roads than is fixed at *other* places for the *same* distance *can not be justified by saying that the rates charged at such other places are reasonably low, and that the rates charged at competing points are unreasonably low, even if the higher rates are reasonably low, when regarded with reference to the profit upon the capital stock invested in the road, they are not reasonable in the true sense of the term if no satisfactory reason can be given for charging less rates for the same or greater service for persons at other stations.* Such corporations should not use their power to benefit particular individuals or to build up particular localities by arbitrary discriminations in their favor that must cause injury to other persons or places engaged in rival pursuits or occupying rival positions.

In the opinion by Lawrence, C. J., after stating the substance of what we have above quoted from paragraph four of the headnote, proceeds in these words:

> Another perfectly well settled rule of the common law in regard to common carriers is, that they should not exercise any unjust or injurious *discriminations* between individuals in their *rates* of toll. In the language of Chief Justice Holt, when delivering the opinion of the court of Kings Bench in the celebrated case of *Coggs* v. *Bernard* (2 Lord Raimond), decided

1703, "the common carrier exercises a *public employment*," and it *necessarily follows that he must deal with the public fairly and without unjust discrimination.*

At the bottom of page 17 the court uses the following language:

> While the law imposes, and always has imposed, upon individuals exercising the vocation of common carriers, the obligation of rendering service *to all persons without injustice to any*, how utterly unreasonable it is to claim that a corporation is to be permitted to *discriminate in its tolls at its own discretion, and without regard to justice, merely* because the legislature, in the charter that created it for the purpose of exercising a like vocation, has authorized it to establish rates of toll, without, in terms, providing that they shall be free from unjust discrimination.

Then, on page 19, the court say:

> This question of *unjust discrimination* is not before this court for the *first time*. In the case of Vincent against this same company (49 Illinois, 33), we held that railway companies can make no injurious *discrimination* between individuals, and, therefore, could not *charge one rate* for delivering corn at a certain elevator in Chicago and a *higher rate* for delivering at another elevator in the same city, and equally accessible upon its line. The same rule was recognized in *The People* vs. *Railroad Company* (55 Illinois, 3). * * * The rule was again declared in *Railroad Company* vs. *People* (56 Illinois, 365). The opinion in that case cites several English and American cases in which it was held that railway companies could not be permitted to practice an injurious and arbitrary *discrimination* between different persons, and we now refer to them without further citation.

The case of *Railway Company* vs. *Sutton*, decided in the House of Lords, 1868 (4, English and Irish Appeals, 226), is one where the authorities prior to that case are thoroughly reviewed, in the leading opinion by Blackburn, J. In entering upon the review which the case contains, by Blackburn, J., of the English cases, he remarks:

> The *weight of authority is, I think, very much in favor of the view I have above expressed.*

So that we have, in this case, decided in 1868–'9, a review, by the highest court of England, of *all* the leading decisions in the courts of that country, construing the various English traffic acts and the railways clauses act, including the ones from which it is said, in the opinions in the circuit court, our interstate commerce act is, in the respects involved in this case, substantially copied, and in which the court reached the conclusions, on such review of the decisions, which we state below.

The decision was based on section *fifty* of the traffic act of 7 and 8 Vict., c. 3. The words of that section are copied in a note on page 228 of 4 English and Irish Appeals, as follows:

> That section gave the defendant power to charge such sum (not exceeding the sum limited by certain special acts) " per ton or per mile, or by bulk, number, measure, or admeasurement, or by fixed charges, as they should think expedient, *provided, always, that in whatever way the charges are made they shall be made equally to all passengers, and to all persons, in respect of all animals, and of all goods, wares, and merchandise, articles, matters, and things of like description and quantity, and conveyed in or propelled by like carriage or engine, passing over the same por-*

tion of and over the same distance along said railways, and under like circumstances, and no reduction or advantage in any of the said charges shall be made partial, either directly or indirectly, in favor or against any particular company or person."

The head note in the case is as follows:

An absolute power in an act of Parliament to fix charges for railway carriage is not rendered conditional by a subsequent clause requiring that all the charges made shall be made equally on like goods, carried under like circumstances, for all persons. The condition only attaches after the power has been exercised.

A charge of so much per ton and 50 per cent. in addition is a tonnage charge, and, therefore, precisely within the words of the fiftieth section of the 7 and 8 Vict., c. 3.

The words "goods of a like description and quantity," and "conveyed along the railway under like circumstances," in the 7 and 8 Vict., c. 3, and "goods of the same description," and "under the same circumstances," in the railways clauses act, are used not with reference to the contents of the parcels, but to the parcels themselves; that is, like or different for the purposes of carriage, and these words are used with reference to the conveyance of the goods, and not to the persons who send them.

In an action for money had and received to recover back charges alleged to have been improperly made on the plaintiff, evidence was tendered at the trial and received to show that mercantile houses were in the habit of dispatching to the railway packed parcels; that is, parcels containing numbers of different parcels of different kind of goods, and sent from and to different persons; that these packed parcels were so packed by the mercantile houses for

the accommodation of their own customers and friends, and that these facts were well known in the trade, and (inferentially) to the railway company, but that a lower charge was made for them than for parcels packed in the same manner by the plaintiff, who was a carrier, and who collected and packed parcels of the same sort in the way of his business. On exception that this evidence was insufficient without affirmatively showing that, as a fact, the defendant knew these mercantile houses did so pack the parcels, and, so knowing, made a difference in the charge, it was held by the court below, and affirmed in this house, that the evidence was admissible, and warranted the judge in telling the juries that "there was evidence that parcels were carried by the defendants for other persons, containing goods of like description, and under like circumstances, at a rate less than such goods were carried by them for the plaintiffs."

The agent and the traffic manager of the defendant had been present as parties at a reference where facts of this sort were proved in the hearing—

Held, That evidence of their having been so present was properly admissible as part of the proof that the defendants were informed and knew of the habits and practices of the mercantile houses, and knowingly charged the plaintiff a higher rate than was demanded of other persons for carriage of like packed parcels of goods carried under the like circumstances.

Money paid in excess under the above circumstances can be recovered back in an action for money had and received.

The case was brought into the House of Lords by error, upon a judgment of the exchequer chamber, which latter chamber had affirmed a judgment in the court of exchequer.

The facts in the case are sufficiently indicated by our quotation of the head note.

There are four opinions in the case, the first by Blackburn, J., extending from page 236 to 246, inclusive; another by Willes, J., extending from page 247 to 250, inclusive; another by Baron Bramwell, extending from page 250 to 254, inclusive; and the last by Lord Chelmsford, extending from page 254 to 264.

These opinions were all, in their substance, concurring opinions. In Justice Blackburn's opinion, after stating (p. 237 *et seq.*) that at common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally, that his obligation was, upon being paid a reasonable compensation, to transport for all customers; and further stating the legislation of England up to the date of the decision, upon the subject of rates for transportation, proceeds (p. 238) as follows:

> Then comes the question, what is the legal effect of this proviso for equality.
>
> I think it appears from the preamble of the ninetieth section of the railways clauses consolidation act, 1845, that the legislature was of opinion that the changed state of things, arising from the general use of railways, *made it expedient to impress an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law.* And if this be borne in mind, I think the construction of the proviso for *equality* is clear, and is, that the defendants may, subject to the limitations in their special act, charge what they think fit, *but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows*

from this, that if the defendants had charged more to one person than they, during the same time, charged to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of *equality* imposed by the statute on railway companies acting as carriers on their line must be *precisely the same* as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable.

The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material as evidence for the jury, tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge was extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not.

It is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day or week or month, or whatever the period might be. I think it would be necessary to show that there was a practice of carrying a person or class of persons at lower rates. But a single occurrence would be evidence to prove this practice, and if followed up by showing that the smaller charge was repeatedly made at intervals over a period of time, the jury would, in the absence of explanations, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and

> consequently that the higher charge was extortionate as being beyond the statutable limit of equality. It would be the very essence of the case to prove that the goods were of like description and carried under like circumstances, but I think that this applies to the description of the goods and the circumstances of the carriage, and not to the trade of the consignor or consignee. The consignor in the present case is what has been called an intercepting carrier, competing with the defendant in one of the most lucrative branches of their traffic. They would have an intelligible motive in wishing to collect his trade, and I do not see that there should be anything immoral or improper in their doing so by any legal means, but I think that the preamble to the XC section of the railways clauses consolidation act of 1845 shows that the legislature thought it inexpedient that railway companies should use their powers for such purpose, and that the intention in passing the equality proviso was to prevent their treating such a person worse than others. The weight of authority is, I think, very much in favor of the view I have above expressed.

The first case cited by Justice Blackburn is *Parker* vs. *The Great Western Railway Company* (7 M. & G., 253), where, in a provision in the charter of the company, it was enacted that—

> The rates or tolls or charges fixed by the company should be reasonable and *equal* to all persons, without reference to the particular advantage to be derived by any individual or class of individuals from such uses.

There the court held that where a *higher* charge was paid in order to induce the railroad to perform the service which, according to the construction of the act, they were

bound to perform for the *smaller* charge, there the payment was not voluntary, was in *excess* of what they were authorized to charge, and was recoverable back for money had and received; and the court remarks that this decision was *known* to Parliament when they passed the railways consolidation act of 1845, and that, therefore, when this section *fifty* of the act (7 and 8 Vict., c. 3) was passed, Parliament was *presumed* to have passed it in view of the said decision in *Parker* vs. *Railway Company, supra;* and that such knowledge by Parliament of said decision *gave construction* to the act; and therefore that a fair construction of that act of 1845 was:

> *That all future railway companies should be subject to this restriction, which the court of common pleas had decided was imposed upon the Great Western Railway Company.*

The next cases presented in the opinion of Justice Blackburn is *Parker* vs. *Great Western Railway Company* (II C. B., 545); also, *Edwards* vs. *Great Western Railway Company* (*id.*, 588). They were decided under said section *fifty*, which had now come into force, brought in the same court, before C. J. Jervis, Maule, Williams, and Talfred.

What is said about this case in the opinion (p. 341) is as follows:

> In delivering judgment in *Edwards* vs. *The Great Western Railway*, the court, C. J. Jervis, proceeds: "The arbitrator finds that the only difference of circumstances here arises from the fact of Parker being a carrier, and that if the same goods, under the same circumstances in other respects, had been tendered to

> the company, they would have carried them for a less sum. The question, therefore, is this: Is the fact of Parker *being a carrier a different circumstance?*" Are the goods carried under *different* circumstances when they are carried for anybody else? Now, looking at the words of the *fiftieth* section of the 7 & 8 Vict. III, *I can not say that they are*, and both *Parker* vs. *Great Western Railway Company* and *Edwards* vs. *Same Company* recovered the overcharges under the count for money had and received.

The next case Justice Blackburn cites is *Crouch* vs. *Railway Company* (9 Exchequer, 556). Of that case Justice Blackburn says:

> In deciding it, Parke, baron, said: "The Ninetieth section of 8 & 9 Vict. c. 20, is not distinguishable from the *fiftieth* section of 7 & 8 Vict., c. 3. The company are bound to charge all persons conveying goods, under like circumstances *equally*. They are at liberty to increase their charges according to the risk and liability incurred, *but they can not make any difference between individuals*. The court of common pleas have already decided that point, and we are bound by their decision."

Justice Blackburn proceeds:

> In a second action by the same plaintiff, in 1856 (*Crouch* vs. *The Great Northern Railway Company*, 11 Exchequer, 742), the opinion of the jury was taken whether, as a question of fact, there was any *difference* in the circumstances between a packed parcel of a carrier, containing enclosures for different persons, and a packed parcel containing several enclosures not belonging to a carrier. The jury found there was *none;* and the court of exchequer held that the question was rightly left to the jury, and

> that the verdict was *right*. Martin, baron, gives what seems to me a very satisfactory reason for the decision.

The next case cited in this opinion of Justice Blackburn is *Pittington* vs. *South Eastern Railway Company* (5 C. B., N. S., 111). In that case Justice Blackburn, in his opinion, says:

> The jury found that there was no additional risk or expense incurred by the company from the packing of parcels. The court of common pleas, consisting on this occasion of Williams, Wiles, and Price, decided that the charge of double for packed parcels was in violation of the equality clause, and the plaintiff recovered the overcharge under a count for money had and received.
>
> Up to this date, as your lordships will observe, the opinion of all the numerous judges who consider the questions of this sort concurred.

The next case cited by Justice Blackburn is *Garton* vs. *Bristol and Exeter Railway Company*, 1861 (1 Best & Smith, 112.) In that case, the plaintiff sued, amongst other things, to recover the difference between what was charged to him for carriages of goods, and what was charged to other persons for carriage of similiar goods. Justice Blackburn says:

> The queen's bench seem to have decided that an action for money had and received would ***not*** lie to recover back the *unequal* charges, *unless it was also unreasonable*. I was a member of the court which decided that case, but I have no recollection of it, nor can I now state how I came to that conclusion. If we thought that the circumstances were not the *same*, so that the *statutable* provision as to *equality* did

> not apply, the decision and the reason assigned for it were, I think, quite right. If, as appears from the report to be the case, the decision went so far as to say that an action for money had and received would *not* lie where the overcharge was in virtue of the established obligation to charge *equally, as much as if it had been in virtue of the common-law obligation to charge reasonably, I think the decision was a mistake. And it was overruled in Baxendale* v. *Great Western Railway Company* (16 C. B., N. S., 137) by the court of exchequer chamber, which comprised three of the four judges who took part in deciding *Garton* v. *Bristol and Exeter Railway Company* in the queen's bench.

The next case noticed in this opinion is *Branley* vs. *South Eastern Railway Company* (12 C. B., N. S., 63), in 1862, and where the first difference in opinion arose. The court says:

> The claim there was to recover back the excessive charge made in France for the carriage of goods from France to London. The whole court of common pleas held that the *statutable* obligation as to *equality* of charges was confined to the railways in England, and that the common law obligation of a carrier did not require him to charge *equally* if he charged *reasonably*. Earle, C. J., speaking for himself, questioned all the former decisions.

The next case noticed is *Baxendale* vs. *Great Western Railway Company* (14 C. B. N. S., 1), decided 1863. The court says of this case:

> The same learned judge gave a very elaborate judgment in favor of defendants on every point. The majority of the court of common pleas gave judgment for plaintiff, resting that judgment solely on the de-

cision of courts of coördinate jurisdiction expressly in point. This was a perfectly sufficient ground for the decision in the common pleas; it ceased to be so when the case was taken by appeal to the court of exchequer chamber. There, however, the former decisions were affirmed.

The conclusion of Justice Blackburn's opinion, so far as relates to the general question, and aside from the particular questions of practice that arose in that case, of no general importance, is in these words:

> In the case now at your lordship's bar the same learned judge again delivered a dissenting judgment. As far as regards the main question the majority of the court of exchequer chamber acted on the authority of *Baxendale* vs. *The Great Western Railway Company* (14 C. B. N. S., 1). There is not any decision in your lordship's houses on the question, and the reasons urged by Earle, C. J., must be weighed and considered by your lordships, as in this house the case can no longer be treated as concluded by authority. It is scarcely necessary to say that I treat the views of Earle, C. J., with great respect, *but I can not but feel that they are based upon an assumption that the railway companies have a moral right to the monopoly of traffic on the lines which they have constructed, and that the legislature could not intend to deprive the railway companies of the power to throw obstacles in the way of other carriers interfering with this monopoly. I do not think it falls within my province as a judge to inquire whether the legislature has been politic or not; but, from the reasons already given, I think it clear that the legislature did intend this very thing.*

In the opinion by Willes, J. (p. 247), is the following sentence:

> The question what is the meaning of the *equality* clause, when it speaks of things of "like description" conveyed under the "*like circumstances*," ought, I think, to be answered by saying that things are of "*like description*," *when although their* composition and structure are not "identical," which would be expressed by "the same description," not "like description," they are similar in those qualities which effect the risk and expense of carriage, and that they are conveyed under like circumstances where the rate, risk, and expense are, in the opinion of a jury, the same; otherwise not. For instance, bags of red wheat and bags of white wheat are of like description, and bags of cotton and bags of jute of like weight and value are of like description, if there be no dissevering circumstances proved; but if it were superadded that one was really more risky or troublesome than the other, the jury would hold that the goods were of different description, and bags of silk may be suggested as an instance in which the jury would be sure to so hold.

The cases now referred to in support of the proposition that *unequal* rates for like service, although no more than fairly compensatory, and not unjust, considered by themselves, may still be, because of their *inequality*, both unlawful and unreasonable within the sense of the interstate-commerce law, as well as of the general law controlling carriers in this country, are but a small part of the cases so holding. Some of the further cases will, in another connection, be presented, which assert the same doctrine; but for the present we leave this point, with

the authorities now given, and submit that it is established that rates, when considered by themseves, may be just and reasonable, and yet be both unlawful and unreasonable, in view of the interstate-commerce law, because of their inequality, when contrasted with others, and unjust discrimination.

EFFECT OF OFFERING "PARTY-RATE TICKETS" TO ALL.

Another proposition asserted by the decision below is somewhat preliminary in its character, although of the essence of the main question, may as well be now considered.

That proposition is, that because the defendant has asserted in its answer (bot. p. 23, top p. 24) that it has avoided confining its party-rate tickets to any class of persons by offering them on the same terms to the public at large, therefore it is not amenable to the charge of unjust discrimination, nor does it incur the danger that such lower charge for parties might be taken advantage of by speculators.

The conclusion reached by defendant, and apparently by the court below, resulting from this allegation of fact, is, that since the whole public are invited to partake of these lower rates represented by party tickets, therefore, if they do not partake, it is their own fault, and they can not complain either of being treated unjustly or of being unjustly discriminated against, or of being treated unequally, and therefore there is no violation either of section three, prohibiting unjust discriminations, or of section two, prohibiting inequality of charge.

We submit that this contention is not, as applied to the facts of the present case, either reasonable, or in accordance with law.

It is not in accordance with law, because, looked at independently of the exceptions contained in section twenty-two, and which we shall presently come to, the interstate commerce act does not make any provision whereby rules may be established that *must inevitably, in practice*, result in giving rates to a few that can not be availed of by a large proportion of the public. It is not in accordance with reason, because the invitation which it holds out to the public is the merest pretense and sham. It is the kind of civility illustrated by the fable of the Stork and the Fox. As to the general public, it is an invitation to a feast which that general public can not by possibility partake of. It is saying to every man, woman, and child, in this vast population of America, of sixty-four millions, traveling upon railroads, that if, when you propose to leave your State by these lines and go to a *foreign country* or to a state *foreign to your own*, you can have the low party-rate charges which are extended to a portion of your fellow-citizens, provided that you make up, organize, and accompany to such foreign country or state, a party of 10 or more; but if your party consists of yourself and wife, or of yourself and wife and seven children, you must pay the higher rate of single-ticket passengers.

It requires no argument to establish that at least three-fourths of all the travel done in America can not make up such parties of 10 before embarking on such journeys. In principle this point was decided in the case of *Crouch*

vs. *Railroad Company* in the King's Bench, January, 1854 (2 C. B., p. 225), also reported in 78 English Common Law Rep. (p. 254–289, 290). In the opinion by Jervis, C. J., will be found asserted the doctrine which is expressed in the last paragraph of the headnote, in the following words:

> A railway company acting as common carriers, and bound by statute to deal *equally* with all persons, can not make a regulation for the conveyance of goods which, *in practice*, affects one individual only."

This is precisely our position in regard to this tender of passenger party-rate tickets to parties of 10 or more.

The attempt to avoid the charge of inequality by offering to all the world the right to take these tickets, when it is known that at least three-fourths of world can not, by possibility, accept the offer, and to say that the three-fourths are not discriminated against because of their omission to accept, is to assert that which is, as seems to us, not greatly different from the absurd.

Take, as an illustration, the facts presented in such a case as *Scofield* vs. *Railway Company*, decided in 1885 (43 Ohio State Rep., p. 571), where two competing oil companies were parties, and the question was one of unjust discrimination.

The case we shall refer to in another connection, but in the present connection, and as a mere illustration, we refer to the facts of that case here. There, the Standard Oil Company appeared to be a shipper to the extent of nearly a million barrels a year, and on account, amongst other things, of the enormous amount of its business, the railroad company extended to it special rates, far less than it charged

to others shipping oil under the same conditions. Suppose now that the railroad company had proclaimed to the public an offer to ship oil at the same rates granted to the Standard Oil Company for *all dealers in oil who should ship the same quantity per year as that shipped by the Standard Oil Company, say a million barrels a year*; and suppose that said company refused to carry for the other dealers in oil for less than double what was charged to the Standard Oil Company unless they shipped a million barrels a year; and suppose, moreover, that the suit was under a statute such as the intersate commerce act, is there a court in the civilized world that would hold that such an offer to ship at the same rates as for the Standard Oil Company, so made to the general public, when it was known in advance that there was not another dealer in the world that could avail himself of such offer, would relieve the defendant of the charge of discrimination? But this is no more an extreme case supposed than is the idea that the vast population of this country, seething as it is with business and activity, and constantly taking trips from State to State on railroads, can stop every time they propose to make such journeys to make up parties of 10, in order to get the rates given to a portion of the public by party ticket.

This pretense of tendered equality is, therefore, a mere mockery, as we respectfully submit, and can not affect the decision of the case—can not affect the decision, we say, because we *assume* that this court will never consent to attribute to this great enactment, the all-prevading purpose of which was to secure to the people, all alike in the affairs of interstate commerce, that justice which has

its foundations in *equality*, the design to attach to their right to demand such justice of the carriers of the country, compliance with conditions precedent, which the whole court judicially and consciously *know* the great body of the people can not, by possibility, comply with.

ANALYSIS OF THE TEXT OF THE STATUTE.

We are, therefore, now brought to the consideration of the question, broadly and generally, *viz*, whether the interstate-commerce act, properly interpreted, renders unlawful "party rate tickets," and justifies the order, Exhibit D (Rec., p. 21).

We maintain that the answer to this question must be in the affirmative.

We so maintain, in the first place, basing ourselves upon the plain words of the statute, fairly construed in the light of reason and unaided by the decisions of courts herein cited, construing analogous equality clauses in other statutes regulating fares and freights.

Observe, in the first place, the language of section 2, fixing this obligation of equality of charge. Leaving out now unnecessary words, not here brought into notice, it enacts that—

> If any common carrier * * * shall * * * charge * * * a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person or *persons* for doing for him or *them* a *like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions*, such common carrier shall, etc.—
>
> be *deemed* guilty of UNJUST discrimination, which is hereby prohibited and declared to be unlawful.

The Century Dictionary defines "deem" as meaning "to adjudge a conclusion." It is not necessary, therefore, to prove an unequal charge to be, in fact, unjust and harmful to an assignable person, the statute adjudges as a conclusion it to be unjust *per se*.

There can not be, and there is not, the slightest doubt about this provision of the statute being one establishing a clear and peremptory rule of charge applicable to all common carriers, and requiring absolute equality of charge in a designated case or class of cases.

What that case or class of cases is to which this positive and peremptory rule of all equality is inflexibly applicable, according to section 2, is also made as plain by the statute as words can make it. The service so subjected to this rule of equality is one which requires to have in it the following elements of sameness or identity. The two services contrasted must be:

1. Like service.
2. They must be contemporaneous.
3. They must be in "a like kind of traffic."
4. The services must be rendered "under substantially similar circumstances and conditions."

If the subject matter of the charge has in it these four elements of sameness, then neither the court below, nor, so far as we know, anybody else, has ever questioned that the statute makes the obligation to make the charge equal, and the violation thereof a crime.

Now, apply this to the present case. The service rendered by the carrier on the two classes of tickets—single and party rate—are identical in the following elements:

1. The service is "like" in each case so far as it relates to the manner of rendering it, each being rendered by transportation in the *same* car;

2. The service is "like" in that it is rendered by carrying a passenger over the same identical line;

3. The service is "like" in their being carried in the same direction;

4. The service is "like" in that it is rendered at the same time; and

5. The service is "like" in that the subject of transportation is the same, to wit, a human being, or several such.

Then coming to the question of the identity or similarity of conditions. The conditions of the service are "similar" in each and every one of the five particulars just enumerated in regard to the character of the services; and the conditions are similar in the following respects:

1. The conditions are "similar" so far as relates to the manner of rendering the services, each being rendered by transportation in the *same* car.

2. The conditions are "similar" in that the services are rendered by carrying a passenger, one or more.

3. The conditions are "similar" in that the services are rendered at the same time.

4. The conditions are "similar" in that the passengers are carried in the same direction and over the same line.

5. The conditions are "similar" in that the subject of transportation is the same, to wit, a human being.

Thus far on the question of "like" services and the "similarity" of conditions there is, we apprehend, no difference of opinion.

The result, therefore, of this analysis is this, that the only difference between the two services being contrasted is that the ticket upon which the "party-rate" passengers are carried is one covering *more than one human being*, and was purchased by one application or payment, and the

persons represented by the ticket are alleged to be required to travel together as one company; whereas in the case of a single ticket it represents but one person.

This, therefore, reduces the question of law here simply to this, viz: Whether buying a ticket for two or more persons at the same time for transportation on the same train over the same line of road and the transportation of such two or more on such ticket causes that service to be dissimilar or unlike the transportation of one on a single ticket, or causes it to be done under different circumstances and conditions.

The court below held that the transportation on a party-rate ticket was a transportation unlike that on a single ticket, and that the service was done under dissimilar circumstances and conditions.

In this, we submit, the court erred.

In our attempt to show that such holding was error, we now notice, in some detail, the elements that enter into the establishment of our proposition.

It is appropriate, in this connection, to direct attention to the difference between the definition found in section 2 of the interstate commerce act of the kind of service which must pay equal rates and that definition found in the English statutes. The different English statutes, containing the description of the classes that must be taxed *equally* for transportation, are substantially alike in that regard, and they are like section 90 of the act of 1845 (see appendix). The part of section 90 in question reads as follows: "Provided, That all such tolls be, at all times, charged equally to *all* persons, and for the *same* rate, whether per ton, per mile, or otherwise, in respect of *all*

passengers and of all goods, or carriages of the *same* description, and conveyed or propelled by a *like* carriage or engine, passing only over the *same* portion of the line of railway under the *same circumstances.*"

Where this section, in describing the class that might not be favored, uses the word "*same,*" our section 2 uses the words "*under substantially similar circumstances and conditions.*"

Omne simile non est idem.

It will be thus perceived that, under our statute, if the "circumstances and conditions" in which the service was rendered be *not* the "same" as the other with which it is to be contrasted (in determining whether exact equality must be adhered to), yet such equality must be adhered to if the "circumstances and conditions" under which the two respective services were rendered be *only* "*substantially similar.*"

That is, as applied to the case at bar, if the circumstances and conditions under which the "party-rate" service is rendered be not the "*same*" as, but only substantially similar to, those under which the "single-ticket" service is rendered, then the two must be the subjects of equal charge.

Keeping now in mind the decisions of the courts upon the requirements of the English statutes to which we have alluded, and also the analysis just given of the elements of sameness in the two services covered by the party rate and the single tickets, we do confidently submit that the court below erred in reaching the conclusion that the equality required by section 2 is not violated by the use of party-rate tickets. This is shown by the de-

cisions which we cite in other connections, showing what the courts have held to be similar and what dissimilar, what like and what unlike. It is shown by both the inherent reason of the thing and by the decisions elsewhere quoted, holding that the unlikeness and the dissimilarity meant by these words in analogous statutes are unlikeness and dissimilarity which *attach to and inhere in the service itself*, as distinguished from matters extraneous to the service, such as the wealth of the shipper, the amount of custom furnished by the shipper through the year, the effect of giving preference, or withholding it, in the way of advancing or retarding the shipper's or carrier's interests *generally*, the building up of local interests of parties to the transaction or third persons, and such as the innumerable other things pointed out by the adjudications of the courts as not inhering in the service and its conditions, and as, therefore, not being elements in determining likeness or similarity as meant by these statutes.

This criterion or test as to what must be present in order that a circumstance or condition shall affect the question of likeness in service and similarity in conditions of its rendition, requiring that it must inhere in the service itself and the conditions of its rendition, if applied to the alleged dissimilarity between "party-rate" tickets and "single tickets," it shows conclusively that this difference between party-rate and single tickets which neither inheres in the nature of the service nor the nature of the conditions under which it is rendered does not render the two dissimilar.

How is the *service itself*, rendered by the carrier, *changed* in its intrinsic qualities by the fact that, in one

case a *ticket* for *one* is bought, and that in the other case a ticket for *more* than one is bought? Or how does this circumstance change the conditions under which the service was rendered unless it be in the matter that one is a *wholesale* and the other a *retail* carrying, of which we will speak in another connection?

What is the difference in either the service rendered or the conditions under which it was rendered between a party-rate ticket man buying a ticket covering two or ten or more, and inviting his party to walk into the cars with him, seat themselves there, and his carrying the ticket for the "party" in one man's pocket on the one hand, and the head of a family having the same number, buying tickets for each member of his family, walking with them into the same car, seating themselves similarly to the "party-rate" company, the head of the family carrying in his pocket the tickets for all, presenting them, as the party-rate ticket is presented, to the conductor, by one act, and receiving transportation in the same car, over the same extent of line, with the party-rate company?

Suggestions like these just made show, as it seems to us, not only that there is no substantial dissimilarity between the two services or in the conditions under which they are rendered, but show, also, that this is so manifestly the case as to render illustration and argument about it (unless in the element of the difference between wholesale and retail, which, as remarked, we elsewhere come to) quite useless.

But this want of dissimilarity we come to in other views, connections, and respects throughout this argument.

DOES THIS STATUTE MERELY REËNACT THE COMMON LAW?

Another view taken by the court below, which, we submit, was erroneous, is that this entire statute was intended to add, as between common carriers and their customers, nothing in the way of securing justice between the carrier and such customers, and also as between the several customers of the carrier, that is not secured to them by the common law; that, in so far as it defines and fixes rights and obligations as between the public and the carrier, it is simply declaratory of the common law, and adds no new rights or obligations, and only defines preëxisting rights and obligations, and adds facilities for enforcing them. That such is the position of the court appears from the following extract from page 119 (folio 252) of the record, in the opinion of Judge Sage. He says:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies, indicating that the act was understood by Congress to be declaratory, and for the prevention of abuses and evasions of the unwritten law, which was adopted and incorporated into the statute, that its construction and operation might be uniform throughout the land and that it might be enforced by sanctions of Federal legislation.

By the words "unwritten law," here used, the court, of course, means the common law. If the court by these words also means the common law, as it is found and declared to be in such cases as *Railroad Company* v. *The People* (67 Ills., 11–17), and in *Messenger* v. *Pa. Ry.*

Co. (36 N. J. Law, 407, 412), and in *New England Ry.* v. *M. C. Ry. Co.* (57 Me., 188), all cited in other connections in this argument, and where the common law of this country is declared to be that common carriers must, under like conditions and circumstances, accord to the people, each and all, not only "*reasonable*," but also "*equal*" rates, then counsel for appellant have, on this point, little controversy with this proposition of the court other than to say that even in *that* view this statute has high significance, for then it has taken the common law, in this supremely important regard, out of the fogs of uncertainty in which for centuries it has been involved, and has changed it into the clear and mandatory precepts of strict statute law, every word of which may, and now must be, by the courts, accorded its full significance and force.

So regarding the true effect of this important statute, it is made to have the precise meaning, qualities, and offices which were given to it by the commission in making its order in this case. (Exhibit D.)

But if by these words, "unwritten law," the court, on the other hand, means, as it manifestly does, the common law, as declared in *Great Western Ry. Co.* v. *Sutton* (4 Eng. and Irish App. Cas., 236), and elsewhere cited in this brief, and which holds that, by such common law, "like services" under similar conditions must be compensated "reasonably," and no more, but not necessarily "*equally*," then we, with unfeigned deference and respect for the court, do most confidently submit that such position is vitally erroneous, and, if enforced, virtually repeals, in all of its essential provisions, the interstate-commerce law.

This position of the court is taken for the purpose of showing that section 22 is not one creating "exceptions" to the prohibitions found in the preceding sections, and of showing that all the rights and obligations of carriers, at common law, were left unchanged by this statute; and that they were, in no degree or respect, added to or subtracted from; and, as the court argued, all discriminations which could be made at common law, by contract between the carrier and his customer, can still be made.

The court seeks to enforce its position, in this regard, by asking (apparently with an air of astonishment that an affirmative answer should ever be given to the questions) whether it would have been unreasonable or unjust to make the discriminations named over in, and permitted by, section 22, had there been no section 22; asks, for example, would it have been unjust to refuse the free carriage of a subject of charity, or of a poor soldier, in carrying them to the homes provided for them by public charity of the State?

Now, this position of the court is, we submit, a remarkable one in several respects. Take for example the following: The court asks whether, if no such exception existed in regard to employés of carriers as is contained in section 22, they would, under the provisions of the act, be required to pay fares when going in the service of their roads?

The plain answer to that question is, no. They would not have to pay if there were no twenty-second section, *because* they in going upon their own road, in their own trains, are not *receiving* service from the road, but are, on the contrary, *serving the road*, and that neither sections 1,

2, 3, nor any other section, has any application to them, because their transportation comes not within the act.

Corporations have no corporeal existence as legal entities, and only act through their agents and employés. Hence the employés of a corporation, in being transported upon trains in doing the service of the company, are not in *receiving* transportation receiving service, *but are the corporation itself doing the service.*

Therefore we answer this question of the court in the negative; but answer it in the negative merely because service rendered *by* employés *to* the corporation is not services rendered *by* the corporation *to* the employés; and therefore, were there no section 22, they would not be required to pay for transportation when actually engaged in the service of running their trains or in doing the corporation's other work.

The employés of a corporation, when being transported on their *own private business and not in the service of the company*, would be, under section 2, required to pay for such transportation were there no section 22. Hence it was proper, provided Congress thought it wise, to insert these employés in the classes in whose favor discriminations might be made.

But how is it as to the other classes which section 22 permits to be favored with discriminating rates.

It is asked as to these, for example as to services for the United States, for States, for municipal governments, for charitable purposes, for journeys to and from fairs, for destitute and homeless persons going to and from charitable institutions, soldiers being transported to and from

their homes, etc., whether, if there were no section 22, it would be *an unjust or unreasonable* discrimination to carry these at lower rates.

We answer this question by saying that the court has here (unintentionally, no doubt) plainly evaded the true point in the case. The interstate-commerce act does not *stop* by requiring, as it does in section 1, that charges shall be just; it does not stop by requiring, as it does in section 3, that there shall be no "unjust discrimination;" but it *proceeds further* and says, in section 2, that everybody shall be charged "equal" rates for "like services under substantially similar conditions."

We might therefore answer each one of the court's questions by saying "No; it would *not* be 'unjust discrimination,' in the absence of section 22, to discriminate in favor of the inmates of charitable homes, etc., in carrying them to and from their asylums at lower rates, and yet it would be strictly *unlawful* under the provisions of section 2."

Obtaining, therefore, negative answers to the questions put by the court (Rec., p. 118) is utterly inconclusive and insignificant as bearing upon the point being considered. This is so for the obvious reason that, when it is *admitted* that, in the absence of the exceptions made in section 22, the things there discriminated in favor of would still, if allowed, not be unreasonable, and though not unreasonable, they would still be *unlawful* because of the "*equality*" required by section 2.

It was, therefore, *necessary*, in order to secure to the classes favored by section 22 the benefits of that section against the operation of section *two* in requiring absolute

equality of charge as to all like services under similar conditions, that the provisions of section 22 should be inserted.

Reduced to its exact substance, this position of the court is that neither section 2, nor any other section establishes any rule of "equality" of charge, and leaves all, as the court assumes it was, at common law, to wit, subject-matter to be contracted about; subject to no other limitation than that "unjust discrimination" should not be made. And having thus abolished section 2, or robbed it of all signification in the way of prohibition of inequality, the court concludes that section 22 is not "exceptive" in its nature; but is, as the court says, "inserted merely as an *enumeration* of a class of persons and things *not* within either the letter or spirit of the interstate commerce act, which it would be lawful to discriminate in favor of without its being so provided in section 22" (see fol. 253).

It is impossible that we should be mistaken about this being substantially the position of the court below. It is one which literally emasculates the entire act, and renders it utterly insignificant and worthless, except in so far as it may turn out to be useful in securing the *enforcement* of the obligations established by the common law.

From this position the court is enabled to draw many conclusions, and to draw the ultimate conclusion that the bill of the Commission must be dismissed.

Another conclusion which the court draws from this position just noticed is that, as at common law, the carrier and his customer may now and always be the judge of

what he shall charge for any given transportation, subject only to the rule that it shall not be "unreasonable."

OPERATION OF SECTION 22.

Another conclusion that is drawn and which is the one that we are now specially considering, is that section 22 is not one which withdraws from the operation of the act things that would be prohibited by the act in the absence of section 22. That is, it is not one creating a class of "*exceptions*" to the general provisions of the act.

The cases which we have gone over, as well as those to which we shall yet come, show that neither in England nor in this country, in States where "equality clauses" are inserted in statutes regulating the charges of common carriers, has this position of the court, that sections like section 2 add nothing to the obligations imposed by the common law, been adopted.

Take as proof of this the language of Lord Blackburn, already quoted in 4th English and Irish Appeal Cases (226). There, in defining the difference between the kind and degree of evidence required to make out a right of action for unlawful charges by carriers, as prohibited by the common law, and that required for establishing a right of action under the fiftieth section, on which the action in the case of Sutton was based, the court, as we have seen, says:

> The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is "unreasonable," and therefore extortionate, the fact that another was charged less is only material as *evidence* for the jury, tending

> to prove that the reasonable charge was the smaller one. When it is sought to show that the extra charge is extortionate, as being contrary to the *statuable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances.*

Here is a decision by the highest court of England, made in construction of statutes from which this court expressly says our interstate-commerce act is, in the main, copied (Rec., p. 155), which expressly declares that this equality clause in the statute from which section 2 of our act is virtually adopted is one creating an additional and new obligation and rights and remedies which did *not* exist at common law, to wit, the obligation of charging equally for substantially the same service.

The court says that such action on such equality section is a "*statuable* obligation to charge equally." Our court below says the opposite, and that no new *rights*, as distinguished from remedies, are created by this equality clause.

And this court, in the case of *The Atchison, Topeka and Santa Fé Railroad Company* v. *Denver and New Orleans Company* (110 U. S. R., 684), in effect declares precisely the *same* thing in regard to the English statutes containing this equality clause, namely: in the railway and canal act of 1854 (17 and 18 Vict., c. 31), and in the English traffic act of 1845.

This court in that case was, by the Denver and New Orleans Company, urged to hold that The A., T. & S.

F. Co. were by law required to allow to the New Orleans Company the Pueblo local rates; and the counsel for the New Orleans Company appealed to the decisions which we have pointed to, or will point to, made under the railway and canal act of 1854, in enforcement of this obligation. But this court rejected that view of counsel holding that those English decisions were made under English *statutes*, which added to the remedies existing at common law for the enforcement of just charges; and that the statutes, so *adding* new obligations, were the basis of those English decisions so appealed to. And this court further held that, as no statute, nor provision of the Colorado constitution, applied to that particular case commanding equality of charge, therefore the English decisions so urged upon the attention of the court did not apply to the case.

This, therefore, is a decision by this court that these English statutes *added new remedies and rights of action securing equality of charge which did not before exist, according to* this English view of what was the common law.

This interstate commerce act of ours is new, and but few decisions, construing it, have been made either in the courts of the States or of the United States.

But so far as we have been able to find, none of them, which touch this equality clause, save the one at the bar, agree with the decision below, and at least one of them, as we have seen, is directly the opposite of it, and expressly decides that the equality clause creates new rights, and that the cases enumerated in section 22 contain *all* the exceptions to the equality provisions of the statutes which the law permits to be made.

The decisions in the State courts, as we have seen, are exactly to the same effect where made upon statutes substantially analogous to the equality clauses in the interstate commerce act. They hold that these State statutes, requiring in effect the equality of charge for like services under like conditions, do not allow the carrier and his customer to agree upon rates more favorable than are accorded to the general public. The same thing is true of the most recent decisions in the English courts, including those of the House of Lords, for they all, up to present date, follow and reaffirm the doctrines laid down by the House of Lords in the Sutton Case (*supra*); as, for example, in the House of Lords' case, cited and relied upon in the court below (folio 288), of *Denaby Main Coaling Company* v. *Manchester S. & L. Rwy. Co.* (11 App. Cas., 97), holding that the British statutes, from which our section 2, etc., are copied (as the court below says (fol. 287, bot. pg. 137), do add, as between carrier and his customer, new rights and obligations not imposed by the common law, as the common law is defined in the Sutton case, and which compel absolute equality of charge, which can not be contracted away by the carrier and his customer.

CONDITIONS SURROUNDING ENACTMENT OF PRESENT ACT.

But in resistance of this position, reached below, holding that this act adds not one new right or obligation, as distinguished from mere remedy, to what the common law imposed, as between the carrier and his customer, considerations still more conclusive, if possible, remain to be yet suggested.

This court in the case of *United States* v. *Union Pacific Railway Company* (91 U. S. R., 72), and in a multitude of cases substantially like it, so far as relates to the rule of interpretation now invoked, holds that—

> In construing an act of Congress, the court may recur to the history of the times when it was passed, in order to ascertain the reasons for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motives which induced them to vote for or against its passage can not be considered.

This rule is especially applicable to public statutes like the one at bar, which reach and profoundly affect, in their material interests, all the people and their institutions.

This the court will do whenever there is doubt, because the court may, by means of taking judicial notice, surround itself with all the material facts and conditions which surrounded the lawmakers when they enacted the law in question, and may thus let in upon its deliberations all the lights which these lawmakers had when they contrived and enacted the several provisions of the act.

Therefore, in obedience to this rule, the court in *United States* v. *Union Pacific Railway* (*supra*) did, in construing the provisions of the Pacific Railroad acts, throw wide open all the doors and the windows, which let in upon its deliberations all of the stupendous conditions and their resulting light, which are exhibited in the opinion of Justice Davis in that case. So here, in construing the present act—one, in its importance, reaching to, and affecting the commercial interests, and, through these interests, affecting all of the material interests of all the

people—the court will surround itself by the facts and conditions which surrounded the legislature in making this law and its amendments; will scrutinize the motives and intentions of the legislature, the conditions of equality, inequality, favoritism, monopoly, and every other condition which led up to the enactment of the law; and in the light which these throw upon the language of the statute will construe it.

This being undoubtedly the right and the duty of this court, if there is reasonable doubt as to what the text of the statute means, we are safe in turning for a few moments to these conditions so surrounding the legislature.

In so turning to these surrounding conditions it is needless to point to any of them, except such as throw light upon the first three sections of the act, together with section 22; this because there is no other issue here than the one inquiring whether a group of persons covered by a party-rate ticket may be accorded a lower *per capita* rate of fare than is accorded to other citizens for like transportation under similar conditions.

Most of these conditions so surrounding Congress at the date of this enactment have already herein been at least incidentally alluded to, but it will not be amiss to recapitulate them in this connection.

They were substantially as follows:

At the date of our act, England, from whence we get most of our common law, and models for much of our statute law, including the very equality clauses of the act now on trial, had, for more than a century before our act, solicitously legislated in the interest of equality of burden; and the very section 2, which is now prominently

the one on trial in our interstate act, had, in exact substance (Rec., bot. p. 137), been enacted in England in the English statute of 1845. Before our act was passed, the great commercial boards of that country, charged with the care for, the watch over, and the defense of English commerce on sea and land, had for centuries been engaged in investigations looking to remedies for the removal of monopolies and all other inequalities going to the obstruction or the burdening of their foreign and domestic trade.

A joint committee of the two Houses of Parliament had, shortly before the enactment of our law, and when the investigations and debates were going on in our Congress looking to the enactment of some law covering the ground occupied by our act, been engaged in taking testimony of witnesses scattered throughout the commercial world, and making other investigations looking to the amendment and enlargement of the provisions of said English acts of 1845 and 1854 further protective of justice and equality, as embodied in said last-named acts.

That committee, before our law was passed, had made most elaborate reports embodying said evidence and the committee's arguments and conclusions based thereon; such conclusions recommending further legislation protective of their commerce, some of which were enacted by the Parliament into law. This report of the joint committee, filling as it does several large volumes, was laid before the committees of both Houses of our Congress charged with reporting bills analogous to our present law; and also before the committee which reported the bill which became our present law. Every one of these re-

ports held to and advocated strongly the policy of the English equality clauses in their statutes as that policy is defined and defended in the English decisions, such as the *Great Western Railway* vs. *Sutton* (4 House of Lords, 226–238, *supra*).

When, therefore, our act was passed, these equality clauses in the English statutes, from which our section 2 is copied, had received that interpretation which was given to them in said Sutton case, which interpretation is expressed by the House of Lords in the words which we have already quoted, to wit, as follows:

> When it is sought to show that a charge is extortionate, as being contrary to the *statutable obligation* to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under like circumstances.

We say that this interpretation of said section 50, on which the Sutton case was decided, and from which our section 2 is substantially copied (Rec., fol. 287), had been earnestly advocated and urged upon the approbation of Parliament by the executive and administrative parts of the British Government.

With all this in regard to the state of the English legislation in the interest of equality, and with the knowledge that the section from which our section 2 is copied had received from the highest court of England its clear and final and conclusive interpretation, adding to the requirements of their common law, as they understood it, the preëmptory rule of equality expressed by Lord Black-

burn and the other law lords which we have just quoted from the Sutton case, fully known to and considered by our Congress it deliberately adopts into our law, in section 2, the equality provision of their said section 50.

This court has, in a recent case, repeated what it has in substance often held before, namely, that after a statute has received from the courts its final and settled interpretation, the construction becomes, in effect for purposes of interpretation, a part of the statute itself as much as if such interpretation were embodied in the words of the act, and if that statute is adopted by future legislatures after its meaning is thus judicially settled by the highest courts of the country, then it will be *assumed and presumed* by the courts, in construing that new law, that it was the design of the legislature that the statute should have the same meaning under the reënactment that the courts had given to it before the reënactment. (See *German Bank* v. *Franklin County*, 128 U. S. R., bottom page, 538, and top of 539; *Douglas* v. *Pike County*, 101 U. S. R., 677, 686, 687; also section 368, Endlich on Stats. (of 1888), and cases in notes 69 and 70.)

Whether this rule of interpretation is technically and strictly applicable to a case where our Congress has adopted an English statute having a fixed judicial construction or not is not, in this case, very material, because even if our courts are not bound, as a matter of strict law, to adhere to its English construction, yet the circumstances just recited make this English interpretation of exceeding great force in getting at the meaning of Congress in so adopting the English law with its *well known and fixed judicial meaning*, and this court will hardly

attribute to Congress a design, in this enactment, at war with the so adjudicated and settled purposes of the act which Congress thus deliberately adopted, apparently, English interpretation and all.

So then the conditions stood which surrounded our Congress when it made this law so far as the country was concerned from which they took the law.

Turn now to the conditions in our own country, at the date of this act, which bear upon the construction of these provisions. These were, if possible, even more significant of the meaning of our equality clauses.

Before this act was passed we had come to be the owners of about 150,000 miles of railway, besides our almost illimitable coast, lake, and river lines. Our railroad lines, we believe, exceeded in mileage the aggregate mileage of all the railroads in Europe. These, our railroads, reached every State and every navigable river and every lake and every other line of transportation in the land, and extended from ocean to ocean. On these lines the amount and value of property being transported from State to State, and the extent of our passenger travel thereon was such, by reason of its vastness, as to defy all our instrumentalities for gathering up the statistics thereof; and in such magnitude it arose far in excess of the aggregate trade of any other country in the world. It represented, and it carried from hamlet to hamlet, as well as from State to State and from ocean to ocean, the wealth of 62,000,000 of people, people proverbial for their diligence in toil and their activity and energy in their illimitable and ceaseless interchanges, accomplished through these lines of travel.

Excluding, now, from this recapitulation of surrounding conditions, every other cause for the universal outcry of the people demanding from their Congress and their States (in the ways we are about to point to) relief from the wrongs inflicted by carriers, all *other* wrongs save those bearing upon the matter of inequality of charge and inequitable discriminations, let us look only at those which do bear upon this matter of inequality of exaction.

These wrongs in the shape of inequality of charge and in inequality of facilities furnished were, as a rule, perpetrated by the managements of the offending corporations for the promotion of some interest of the officers or an officer connected in that management, or for the promotion of some interest of the corporation itself, or for the promotion of the interest of some favored person, or for the promotion, at the expense of others, of some special locality or community, or of some favorite local interest or trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The occurrence of these acts of favoritism on the one hand and of hostility on the other, so far from being exceptional or rare, had for long years before our act was passed become so general as to pervade almost the entire vast railroad system of the United States; and the artificial persons so practicing these partialities had become so powerful and so cunning as to be able to either defy or to *evade* all attempts by legislation to either remove or even to materially check them.

As these monopolies grew in wealth and in extent of mileage they grew, in the same ratio, in their power for

mischief, and in the audacity with which their mischiefs were perpetrated.

So the evil advanced throughout the years, and "grew by what it fed upon," namely, upon the despoiled commerce of the whole people and the elements that made it up, until the mischief became, in its extent, almost universal, and in its merciless cruelties of exaction became intolerable oppressions.

The results of these enormous wrongs were seen in the decay and ruin of one community, or village, or town, or industry, or trade, or citizen or class of citizens, or disfavored line of travel; such ruin or decay being accomplished by means of unjust discriminations and increased rates of charge, by inferior and inadequate facilities furnished in the way of cars, by the refusal of stations for embarkation and shipment, by refusals to stop trains, by refusal of needed connections or the formation of hostile ones, and by the other innumerable ways in which unprincipled men, controlling illimitable amounts of associated capital, and combined in powerful corporations, can readily devise for attaining, at the expense of all others, the aims of unscrupulous favoritism and partiality, and of insatiable greed.

This mischief attained at last such proportions that the great body of the people not only *felt* the oppression but became alarmed for the very safety of their institutions. They saw the fattened and petted corporation grow to the dimensions of hundreds of millions of capital, their retainers grow to standing armies, extending across the length and breadth of all the States. They saw, or thought they saw, the electors composing whole commu-

nities, and even States, swayed by the cunning use of this concentrated power and wealth. They saw, or thought they saw, legislatures subsidized by these. They saw thriving villages and towns extinguished by these partialities, and saw the products of the people's toil either taxed out of existence or perish in the fields as the result of these stupendous wrongs.

When they could be endured no more, the people, or a large proportion of them, arose in a general endeavor to meet and to remedy the mischief. The press of the country was measurably aroused to a notice of the all-pervading calamity. Labor parties (Grangers) and anti-monopoly parties were organized. The courts were appealed to; and from these courts the appeals were again and again carried to this court to remedy, so far as could be done under existing law, the consuming mischief.

Chambers of commerce took the matter up. Boards of trade took it up. Legislatures were inundated with petitions, an average, and a not extreme, specimen of which may, by way of illustration, be named by pointing to information sent to the Committee of Commerce in the House of Representatives from the Chamber of Commerce of Cincinnati, saying that millions of dollars' worth of the products of the people's labor, in the region of country making their shipments at that city for New York, were then being burdened with the necessity of sending their freights (shipped for New York) from Cincinnati to St. Louis, and from the latter place back, through Cincinnati, to New York—this for the purpose of obtaining, at St.

Louis, the low rates of transportation then prevailing there—low as contrasted with those then in force at Cincinnati.

During the years in which this state of things prevailed, the framers of constitutions and of laws in some of the States took the matter up, and, indeed, in most of them. Laws were passed controlling commerce within the States, respectively, which virtually enacted what now are sections 1, 2, 3, and 22 of our interstate-commerce act, and thus this evil has been, as to commerce within the respective States, measurably checked.

But all that vast portion of our commerce which is interstate commerce is beyond the protection of the State legislatures in these regards. Hence the oppression of the people's industries, as represented in this interstate commerce, went on, in a large degree, unchecked.

Through a quarter of a century the people of the country continued to memorialize their Congress; and their Congress, for that quarter of a century, continued to investigate and to debate. At last, out of these convulsions and out of this travail of the whole people, came that most able, elaborate, and exhaustive report from a select committee of the Senate which introduced the bill passed into the law which is now on trial at your bar.

In aid of your interpretation of this act, you may also read that report as indicating the conditions of commerce which Congress was then considering, and thereby indicating those conditions in the presence of which the Congress passed the law. Ordinarily you do not look, in construing statutes (as we have seen by the case of *United States*

v. *Union Pacific Railway*, 72) at the statements of individual members made in debate; but in construing a great public act like this you may and you do look at the contents of the reports of committees, and at the journals and other records of the Houses, which relate to and throw light on the intentions of Congress in making the law which you are construing. (See section 68 of Endlich on Interpretation of Statutes, 1888, and cases cited in notes 51, 52, 53, and 54).

The report which accompanied the introduction of said bill which became the Interstate Commerce act is No. 46, first session, Forty-ninth Congress, and was made by a select committee composed of Senators Cullom, Miller, Platt, Gorman, and Harris. It is one which goes, with great fullness, clearness, and detail, into the matters of the character, the extent, the condition, and the wants, in the way of protection, etc., of our commerce. Along with the report it submitted to the Senate the testimony taken and the statements received by the committee in response to its correspondence. Of these things so submitted the committee says that it "fairly represented the best thought of the American people upon the questions involved in the regulation of commerce among the States."

The report said in substance—

The country was suffering from *unequal charges*, and, notwithstanding the common-law obligation of the carriers to *make just rates*, which could not discriminate, practically a greater part of the business of the community was placed at disadvantage.

And as to this said that—

> No excuse can be offered for any discrimination in the *charges* made by a common carrier as between persons *similarly situated* for whom a *like service is performed under similar circumstances.*
>
> This is the *most flagrant and reprehensible form of arbitrary discrimination. Individual favoritism is the greatest evil chargeable against the management of the transportation system of the United States.* The evidence before the committee shows that it has come to be considered by railroad officials as an indispensable feature of the system upon which their business is now carried on, and reveals its existence to an extent that imperatively demands the additional legislation to protect the people in their common law rights and to insure them the equal enjoyment of the advantages of transportation. * * *
>
> It is substantially agreed by all parties in interest that *the great desideratum is to secure equality, so far as practicable, in the facilities for transportation afforded and the rates charged by the instrumentalities of commerce.* The burden of the complaint is against unfair differences in those particulars as between places, persons, and commodities, and its essence is that these differences are unjust in comparison with the rates allowed or the facilities afforded to other persons and places for a like service under similar circumstances.
>
> The first question to be determined, apparently, is whether the inequalities complained of and admitted to exist are inevitable, or whether they are entirely the result of arbitrary and unnecessary discrimination on the part of the common carriers of the country; and the consideration of the question suggests an inquiry as to the proper basis upon which rates of transportation should be established. * * *

> Fully appreciating these difficulties, the committee believes that every effort possible should be put forth by Congress to secure *equality between man and man* in respect to the matter of transportation and that one means to that end would be the prohibition of personal preferences under suitable penalties, which should be supplemented by proper provisions for securing publicity of rates. Commerce can and does adjust itself to inequalities of every description, but it can not prosper or be carried on legitimately while individual favoritism controls the distribution of the advantages of transportation.

The recapitulation now gone over furnishes, inadequately it is true, some of the conditions which surrounded the lawmakers, and which pervaded this entire country, when the interstate-commerce act was debated, considered, and its provisions contrived, and these enacted into law. These are here enumerated before you for the purpose of aiding you in finding out whether this law was meant to add to the provisions of the common law as that common law is stated in the case of *Sutton* (*supra*), a *new* right in favor of the people and a new obligation on the part of carriers, by which the evils of unequal discrimination and of arbitrary partiality, in the interest of monopolies, or of selfishness, should be remedied, or whether, on the other hand, there has come out of this quarter of a century of struggle, on the part of the people, or of these convulsions and this labor, not of one mountain but, of all the mountains, the birth of, not even a living mouse, but a hideous, shapeless, and lifeless abortion, such as the decision below makes this statute to be—makes it to be when it is held neither to confer *one*

new right, as against the carrier, upon any citizen, nor to impose *one* new obligation, as against the carrier, which did not exist in the laws before the act was passed; and that it did not create, as in favor of the one, or against the other, one single new *remedy which would be binding and final in enforcement of said existing rights and obligations*—that the *most* that the law does is to simply create a tribunal that can hand over, to the courts of the country, reports on facts which would be taken as prima facie accurate in suits in vindication of rights and enforcement of obligations which *had fully and completely existed during all theyears before the act was passed.*

Here we leave this position of the court below as one which, we submit, this court will not be inclined to adopt.

We therefore assume that the equality clause found in section 2 of this act is a *law;* that it is a law which means what it says, and that it does peremptorily require equality of charge for substantially "like" service, rendered under substantially "similar" conditions, and that it is a *new* and additional obligation created by statute that can never be whistled down or contracted away as against the public, according to the discretion of the carrier and the party with whom he deals.

"PARTY" AND "SINGLE" TICKET NOT DISSIMILAR SERVICE.

This being established, we now turn to the next subdivision of our main question, which subdivision we wish to consider separately.

That subdivision is this:

Is there either an unlike service or a substantial dissimilarity between these two transactions, to wit: The selling

of one ticket for ten or more, on the application of one person, for transportation over a given line of road, on a given date, *and* the transporting of such persons on said ticket as one party; and, on the other hand, the selling of a single ticket to one person for transportation over the same line, in the same car, on the same day, and over the same road, as will, within the sense of section 2, render either the service in the two named cases "unlike," or will render the "performance" of that service one rendered under dissimilar circumstances and conditions?

We have already analyzed this question of similarity or dissimilarity, by an inspection of the text of section 2, and have found no difference between the two services, except that one contract of purchase has covered ten or more persons, whereas the other has covered but one; and the ten or more travel in "a party," whereas the other person, or the single-ticket "party," was composed of but one. Does that constitute an "unlike" service, or one rendered under dissimilar circumstances and conditions?

In this connection, and by way of premise, it is appropriate to notice another position of the court below, bearing upon the present point, as found at folio 254 of the record.

This preliminary suggestion relates to the position by the court there in substance stated, that whilst the court holds that the statute does not cover or render unlawful *any* party-rate ticket whatever, of any *dimensions* whatever, yet that party-rate tickets, when covering but *two* persons, shall be held to be prohibited by the statute, and to be an "evasion" of the statute, which the courts would suppress.

It can not be denied that the statute does not, in terms, license the extending of reduced rates to *any* number of persons on *any* form of ticket, for any similar service, save as expressed in section 22.

If, therefore, by *implication* or *construction*, an authority can be found in the act for extending reduced rates to *any* number of persons, then that number is wholly unindicated by the statute. In the statute no rule can be found either fixing or limiting the number who may thus be favored by party-rate tickets.

Hence, authority to fix the number of passengers embraced in such party-rate ticket can be found nowhere else than in the "discretion" or "agreement" of the parties to the transportation, to wit, the carrier and his customer.

That being undeniably so, what is to be the *limitation* of, or the boundaries to, that discretion? What is there in the nature of the case to prohibit that "discretion" from saying that "since I have more profit, *per capita*, on carrying *two* passengers than on carrying *one* at the same time, therefore, I will give reduced rates, by the party ticket, on a party of two?" And if the statute fixes no rule by saying that there shall be *no* party tickets, what right has the court below to say, as it does (Rec., fol. 254), that party-rate tickets of *two* would be an "evasion" of the statute, when that same court holds, in the same decision, that the statute does not embrace, and, hence, can not render unlawful, *any* party-rate ticket of *any* dimensions?

No; the truth is that the statute either renders unlawful *all* party-rate tickets, or it so renders *none*. And in

the last case, every transportation, so far as relates to charges, both of persons and of freights, is wholly uncontrolled and untouched by the statute; and *all* is left to the "discretion" of the carrier and his customer to fix, as at common law. Thus the interstate-commerce act, in all respects relating to rates of charge on all descriptions of interstate commerce, is simply, literally, and exactly *abolished* by what seems to us to be a most astounding act of judicial *repeal* instead of construction.

We shall, therefore, on this point feel at liberty to *assume* that if party-rate tickets for ten or more can be, by means of the "discretion" of the carrier and his customer, adopted or rendered lawful, so can any greater number or any less number.

With this premised, we proceed to say that the only really intelligible ground upon which, so far as we know, this right of discrimination, in favor of party-rate passengers, is one which assimilates it to the conceded right, under this interstate-commerce act, to discriminate in favor of *large* quantities, shipped at once on the same car, to wit, "carloads" and "less than carloads," and which gives the right to carry at wholesale rates the larger quantity.

It is asserted in the defendant's answer, and in the opinion of the court below, that the ground upon which they claim the two services to be unlike and dissimilar is that *greater profit per capita* accrues from accepting, in bulk, ten passengers and shipping them at once, than is earned by transporting one passenger; and *therefore*, it is

said that the two services are dissimilar, just as wholesale and retail rates for shipping freights are dissimilar within the sense of section 2.

This argument from analogy is manifestly, like all arguments from analogy, are, proverbially, apt to be, deceptive and fallacious. The fallacy in the argument is in assuming that there is such *sameness* between human beings and ordinary freight as that each may be dealt with alike and upon similar principles, by the common carrier, in regulating the matter of the transportation of the two classes respectively; that like as the common carrier may "bunch" hogs and may transport *them* at wholesale carload rates, so also may a carrier "bunch" human beings and accept and ship *them* at wholesale rates, according to his pleasure, without violating section 2.

This logic is that because a carrier may "bunch" hogs and ship them at wholesale rates lower than for transportating a single hog, *ergo* he may "bunch" men, women, and children, and carry them at wholesale rates, and lower *per capita* than for carrying one person on a single ticket.

We are asked *why* this is not good law and good logic?

Our answer is that the carrier may not do so because *men are not hogs*, an answer which is neither curt nor disrespectful nor inappropriate, but is, in legal contemplation, one that is at once the most comprehensive, the most respectful, the most exact, and the most appropriate that can be selected.

Remember, it is now a question as to the *meaning* of the statute with which we deal. Remember, that our question now is, whether, in making the interstate-commerce law,

Congress *meant* to put the transportation of the people of this country by common carriers in the same category regarding rights, obligations, and duties of the common carrier and the passenger, respectively, with the transportation of hogs or any other such live stock?

Remember that our question is, whether it was the *intention* of the framers of this act to say that, because you may grant lower rates for carloads of dead freight or of living animal freight, that therefore the people of the United States may be dealt with in the *same* manner, and may be, in giving that transportation, "bunched" as stock may be for the purposes of *wholesale* rates.

Congress has confessedly not, *in terms*, so declared.

Our question then is, will you *impute* to Congress a purpose to put the people of the United States, in regard to the stupendously great and important matter of their travel between these States, in the same class, for example, with swine?

Let us for a moment test this question by some questions analogous to that which we have above stated as the ones on which the court rested this case, viz: That because you can "bunch" swine for the purpose of getting "wholesale" rates on their transportation, that therefore you can "bunch" men.

You can, under this statute, or any other equality statute, as is settled, distinguish between large bulks or weights in freight, shipped at the same time, in fixing the rates of charge. Will the logic of the position, which we resist, answer questions like the following?

You may ship *two* hogs from one place to another, one weighing 400 and the other 50 pounds, and you may,

under the present law, charge eight times as much for the heavier as for the lighter. May you do so as to two *men* taking passage at the same time, one weighing 400 and the other 50 pounds, and under the present law charge the heavier man eight times as much for transportation as the lighter?

One man may send, by express, a hog over a given line, in a given car, at a cost of say $1. Another man takes passage on the same train, say from Washington to New York, and must pay $6, although his weight does not exceed that of the swine. Has the owner of the swine been discriminated in favor of by this transaction?

The law requires of carriers, in the transportation of mere freights, "ordinary care and attention" (12 Wal., 254; 15 Wal., 254). Does it, therefore, require, in the case of the transportation of a human being, no more than "ordinary" care? Does it, therefore, follow from such rule as to freights that in the transportation of human beings no more is required of the carrier? It is required in the case of such a passenger as stated by this court, "the *utmost* caution," and the law makes him responsible for injuries received by his passenger by reason of the want of "extraordinary vigilance aided by the highest skill" (16 How., 469; 102 U. S., 451).

The law makes the carriers of human beings on railroads liable to be prosecuted in the criminal courts of the country, either for murder or for manslaughter, for causing the death of one of their human passengers through unlawful acts or other fault of the carrier. Does it, therefore, make the carrier so liable for causing the death of an ox through the same kind of negligence?

The law makes the carrier responsible, in those States where Lord Campbell's act is in force, in negligently causing the death of a human passenger. Is any such consequence attached by law to causing, in transportation, by like negligence, the death of a brute?

These cases so put, grotesque as some of them may seem to be in their absurdity, are yet perfectly apposite and exactly appropriate in illustrating the principle by us here asserted and for fixing in the mind of the court the *ground* upon which we base our assertion that it is the design of no law of Congress to assimilate the transportation of the people to the transportation of dead or live freight; that there is no *similitude* between the two kinds of transportation; that it is not the design of the act of Congress to permit the same rules to be applied, either to the *mode* of transportation, the *facilities* for transportation, or the *grouping* for the purposes of transportation; or to suffer the carrier in making the transportation to make any *other* material element in the transportation of freights to be the *same* with that required by the law for the transportation of people.

When this point is reduced to its essential basis it will be found to be this, that in the law relating to common carriers, throughout the civilized world, there are certain principles and rules of right and liability differentiating, establishing, and controlling these two classes of transportation, to wit, the people on the one hand and freights on the other; and that in both classes of transportation certain *units of quantity, quality, and value* have become fixed and recognized and are controlling elements in regard to the transportation and the cost thereof.

In the case of freights throughout this country, one class of *units* of transportion is "carloads" and another "less than carloads," and different rates are attached to these quantities. But in the case of transporting passengers, the *unit* invariably is, in fixing the cost therefor, *the single human being.*

The law does not permit his *identity as an individual man* to be either blinked, obliterated, or merged in any possible arrangement that can be made by the carrier. That human being the law still persists and insists in regarding and taking care of as an *individual man*, as distinguished from mere freight; and in enacting the equality clause it deals with, and legislates for, *each man as a unit or entity*, or, here quoting the language of section 2, as a "person" or as "persons," *each individual* being recognized as making up the *plural;* and that the human *unit* can not be abolished in fixing rates for transportation, or *terms* of transportation, or otherwise; and no art, cunning, "device," or learning will be permitted (and they have all been exhausted in trying it) to arrange and put words into a form of ticket for transportation that will contract away or otherwise destroy or evade this obligation which the law has fastened upon the carrier's duties, as against the carrier and in favor of the citizen, however humble he may be, in securement of the passenger's *individual rights as a man.*

This is one of the most beneficent qualities of the common law applicable to this subject, rising in its dignity and beneficence to the supreme, and giving its noblest character to the law regulating the commerce of the world.

It is for this reason that Congress did not *intend*, by the interstate-commerce law, to allow the people to be "bunched" like cattle for purposes of transportation; and it will not recognize any right to either discriminate between different passengers in regard to this transportation, or to let down the standard in favor of each man, woman, and child carried through or by reason of letting down the price of such carriage.

Accordingly, we have not been able to find in any American or English case any authority for saying that passengers may be clubbed together for the purpose of giving *each* member of the club advantages in travel over his fellow traveler, traveling under the same condition, except as to arbitrary "bunching," and we submit, therefore, that this position is unsound, and must be repudiated which asserts that you may "wholesale" passengers as you may ordinary freights in securing a reduction of rates.

The result, if we are right in this, is, therefore, to establish that the "bunching" of passengers together on a "party ticket" is not, as contrasted with the single-passenger ticket, a "circumstance" that renders the service of the transportation in the two cases unlike, or the "conditions" "dissimilar." In this view, therefore, the letter of section 2, considered by itself and independently of section 22, is a prohibition against party-rate tickets, because it does not permit individual men and women to be disposed of in wholesale lots in making interstate transportation thereof, but, for all purposes of transportation, reserves and protects their individual identity.

Who shall say that the unit in passenger travel is other than the individual passenger?

When property is delivered in even solid carload lots for transportation, there are present conditions which materially lessen the cost of transportation, and the extreme limit of the application of the doctrine of wholesale rates in the transportation of freight is reached when a lower rate is accorded to even carload quantities.

The business of one shipper may be a thousand fold greater than that of another, but unless it is so delivered as to conform to the unit of freight transportation, *i. e.*, a carload, he is not entitled to better rates on that account; he must pay the same as the smaller shipper.

The question has been raised in regard to the delivery of freight for transportation in full train loads, as to whether such a delivery was not entitled to a lower rate of charge, but the question has never been judicially determined; it is therefore unimportant to consider that question here except for the purpose of making the proposition more clear, that in freight transportation the recognized unit of transportation is that of the carload.

There is very little similarity in the transportation of persons and property. As to the former, the individual has always been deemed the unit; it is a matter of common knowledge, as was said by Mr. Commissioner Schoonmaker in *N. Y. Board of Trade* vs. *P. R. R. Co.* (2 I. C. Rep., 755), that—

> In the passenger service quantity is not considered, and passengers weighing three times as much and with the full limit of baggage are charged the same rate for the same journey as the lighter passenger without baggage.

The only recognized classes of passengers in this country are, first, second, and emigrant, the difference in the cost of transportation depending solely on the difference in accommodation as the carriers claim, with more or less plausibility. As to the transportation of property, however, the course of business is entirely different; the facts which enter into the making of freight rates were in part given by Commissioner Schoonmaker in the case last cited (p. 751).

> The competitive element, or the rates made necessary by competition; volume of the business, or tonnage; the direction in which the freight moves, whether that in which most of the freight is transported, or the reverse direction, in which the empty cars move; the value of the article, to some extent, its bulk, its weight, and the risks attending transportation; the facilities required for particular or unusual transportation; the conditions attending transportation, embracing many things, such as the necessity for furnishing special equipment, as in the case of cars for dressed beef, or cars specially adapted for freight of a perishable nature, large cars for freight of extraordinary bulk, etc., also the analogy which the articles classed bears to other articles in the classification; the conditions under which different railroad companies can afford to transport traffic have a large influence; the volume of a particular traffic upon a line of road, and the nature of the competition that it has to meet.

The reasons which justify the carriage of solid carloads of freight at a less rate than broken lots, are not present in the transportation of persons, even if carried in full carloads.

1. Persons are carried by number; property is carried by weight.

2. The cost of loading and unloading the cars is an element which justifies a lower rate to carload lots than to miscellaneous freight of less than a carload quantity, but in passenger traffic the loading and unloading is not an element of expense in either case.

3. The relative earnings of the cars in which full carload lots are moved is greater than those in which the miscellaneous freight is moved. The experience of leading railroads in this particular is given (2 I. C. Rep., 748). Full carloads earn for their cars up to their entire carrying capacity. Less than carloads in this respect resemble passenger traffic.

4. The terminal expenses of freight in carloads is very much less than for less than carloads; in the passenger traffic there would be no difference in this respect.

5. The cost of switching is not so great for even, solid carloads as for less than carloads, and this element is not present in passenger traffic.

6. The risk to the carrier is less in the case of even, solid carloads than in case of less than carloads, and this element is not present in passenger traffic.

7. There is for even, solid carloads less detention of cars than in the case of less than carloads, and this element is not present in passenger traffic.

From which it appears that there is no analogy between the concession in the rate to carload quantities of freight and a carload of passengers.

Such a comparison might be, however, made with some show of reason, if the decision of the court below had been based upon the principle that such a concession ought to be made to a carload, or 60 passengers.

Between recognized units of transportation, whether of persons or property, the rate to all must be equal. In freight for less than carloads no difference is made in charge per hundredweight, which may in a certain sense be said to be the unit of that transportation.

The attempt here is to make a concession between two of the small fractions of a carload of passengers.

"Sutton's Case" is not contrary to the principle here laid down. It appeared there that the less rate was accorded to the shipper of a number of parcels, packed in one hamper, than a pro rata of the rate charged to the shipper of one parcel, because of the railroad company being relieved in the one case of collecting and delivering each separate package. The English companies do the same business as our express companies, and under the act of 1845, according to the decision, are permitted to charge less to one shipper of many parcels in one package than to many shippers of many parcels in individual packages; not on the ground of a decrease of cost in the actual transportation between the railroad termini, but because of the increased expense of collecting the separate parcels before the transit commences and of delivering the same after the transit has terminated, conditions which are not present in passenger traffic.

A passenger car holds 60 persons. Whether a party rate might not be properly accorded to 60 persons, who, by the terms of the ticket, were to be confined to the limits of a single car, needs no further discussion than has been given, for the contention here is that the lesser rate is applicable when one-sixth of the capacity of the car is reached; that is to say, at 10 persons, as distinguished from a less

number. The decision is to the effect that from one-sixtieth to nine-sixtieths of a carload of passengers individual "retail" rates must apply, but as to ten-sixtieths of a carload or more party or "wholesale" rates apply. No reason is given for drawing the line at this exact fraction of a carload; fractions of carloads never have been considered in making rates for the transportation of freight; no statement can be found on the part of any of the witnesses giving any reason or shadow of reason why one-sixth or greater fraction of a carload should be the number to which a wholesale rate should apply.

A party of nine persons, according to the testimony of McCarty, between Columbus and Pittsburg, would have to pay $54 for their transportation, while a party of ten between the same points, carried in the same car and receiving the same identical service, would pay but $38.50; that is to say, one more person would be transported and with $15.50 less revenue.

If the practice of the companies be looked into no satisfactory definition of the number which shall constitute a "party" can be obtained. On the Union Pacific, as testified to by McCarty, a party rate was in effect applicable to two persons. And nearly all the roads had in effect, at the time of the passage of the law, a party-rate ticket applicable to four or more persons. (See testimony of George H. Daniels.)

It costs primarily the same amount to transport one passenger that it does another. The case shows affirmatively that the principle which prompted the issuance of party-rate tickets before the law was not the doctrine of "wholesale" and "retail," now so solemnly invoked as

between fractions of a carload, but that of increasing travel to the cities upon the occasion of the theatrical exhibitions.

In the transportation of freight, the inanimate articles are not in competition with each other, and not withstanding the fact that "wholesale" rates may be said to apply to carload quantities, which is practically the unit of transportation for freight, still the unit, considering the shipped rather than the shipment, is the individual who owns the freight.

The intention of the law is to give every man equal charges for his transportation, whether of property or his person; and this is true of freight as of persons, for the charge to persons, who use the same kind of transportation, that is, transportation of the same class, is, or ought to be, equal.

If it be assumed that at some number of passengers the doctrine of wholesale rates should apply, it is useless to inquire only whether a party of 10 is a proper number to which such rates should be given. The case must be tried upon the proofs, and the only proven fact as to a party of 10 is the finding of the Interstate Commerce Commission that such a party is not within any rule which made a difference in the circumstances so as to justify a lower rate per capita.

The court below erred, therefore, in disregarding the finding of the Commission, which the courts of the land are to regard as the end of the law, unless the finding be successfully disputed by other proofs. No witness testified that a party of 10 came within the doctrine of lower

"wholesale" rates, nor did any witness attempt to point out at what number of passengers the limit was to be found when lower rates ought to apply.

It is true, the court says that in the transportation of a party of 10 there is a saving of cost over the transportation of 10 individual passengers, but the witnesses did not so testify, and the court fails to point out wherein the saving exists. None does exist.

If for "businesss" reasons alone, either remote or immediate, carriers may discriminate between individuals, or the recognized units of transportation, the interstate-commerce law, whose beneficial effects are conceded by the carriers themselves, and which has been of so great benefit to all who have occasion to use the transportation lines by making rates stable and uniform, will cease to be of effect as a statute of regulation and the business of the country will be at once subjected to the former evils, which it has mitigated to so marked an extent.

Under the guise of "business reasons," favoritism, discriminative, unjust, and unequal rates will again disturb and distract the business interests of the country.

If it has been the fact that the railroad carriers conducted their operations with strict impartiality and honesty, then there would have been little use of the enactment of the statute.

Hence there is no force in the suggestion in the decision of the court below that these tickets are not liable to abuse through the medium of ticket brokers, or "scalpers," as they are popularly known.

The act was not directed to the suppression of ticket brokerage, but was specially directed to the dishonest

methods of conducting the business by the carriers themselves, which universally characterized the transportation business of the country at the time of the passage of the act.

The party-rate ticket affords to the dishonest carrier opportunities for the exercise of favoritism and all the other evils which formerly permeated the methods of doing this kind of business, as is pointed out by Mr. Tuttle in his testimony and by the Commission (2. I. C. R., 649).

If the carrier be dishonest, the party-rate ticket offers ample opportunity for the exercise of favoritism and discrimination, and if the principle upon which it is defended prevails, a "business" excuse can be found for every unequal charge.

If the carrier be honest the ticket opens a new field for the operation of the "scalper," who would find it to be a profitable method of doing business to organize parties, who would have nothing in common, except the saving in fares.

In the example given by one witness, a party of ten traveling from Columbus to Pittsburg on individual tickets would have to pay $60; traveling on a party-rate ticket, $38.50, a difference of $21.50, which would be ample inducement for the speculation of the scalper.

So long as the use of the party-rate ticket was confined to "theatrical parties" it would not seem to have had a pernicious effect on the business interests of the country. Congress, however, must be presumed to have determined, in making the exceptions it did, that the best interests of

the country did not require the same concession which should be made to others of the then recognized classes of travelers; but now that it is sought to make the rate an open one and upon a principle which will utterly defeat the object of the law, so far as passenger traffic is concerned, there should be no hesitation in applying the rule of equality prescribed by the law, excepting only such persons as come fairly and legitimately within the declared exception.

SECTION 2 SECURES EQUALITY TO "PERSONS" IN EXPRESS WORDS.

There is still another view in which we think the *letter* of section 2 sustains our position. It will be observed that the statute is careful to provide that if any carrier shall

> Charge, demand, collect, or receive from any person or *persons* a greater or less compensation for transportation of passengers or property subject to the act than it charges or demands for any other person or *persons* for doing for him or *them* a like service, then the carrier shall be guilty.

Why are these plurals, "persons" and "them," carefully inserted? The addition of these plurals was wholly unnecessary, and, indeed, improper, if the statute meant to allow "persons" to be clubbed together and charged a greater or a less rate than another "person," traveling in the same car, at the same time, over the same line, under substantially similar circumstances and conditions.

Our interpretation of this part of the section, which adds this word "persons" twice over, is, that the design

of the addition would be expressed if the section read as follows, leaving out words not necessary to the present point:

> That if any common carrier * * * shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge * * * any person or persons a greater or less compensation for any service rendered * * * than it charges any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful: *Provided*, That, in determining, in such cases, the question of unjust discrimination, the charge made to each person in a group of persons shall not be greater or less than the charge made to every other passenger for like services rendered under substantially similar conditions, whether such other passenger shall belong to a group of persons or not.

In other words, these additions of the word "persons," in the plural, do not mean that it shall be lawful to group together one company, and to treat as a unit for transportation such group of persons; and to contrast the charge made to such group, as a unit, with the charge made to another group as a unit, ignoring in each case the *individual persons* making up the group, and thus requiring each group to be charged the same amount, although the number of persons in one group may greatly exceed the number of persons in the other.

This palpably is not what this addition of the plurals, "persons" and "them," means.

On the contrary, this addition of the plurals means that each person of a number of persons shall be charged the same *per capita*, and distributively, as each person is charged who is not of said group or party, and whether such other person be a member of a group of persons or not.

In short, we submit that the design of this addition of the plural number in the word "persons" is to make it so that by no "device" (as mentioned in the first part of the section) either of grouping individuals together, or otherwise, shall one citizen, for like service, rendered under substantially the same conditions, be charged more or less than another citizen.

CONSIDERATION OF SECTION 22.

If we are right in this which has gone before, then, of course, no need exists for further argument based upon section 22 of the act, taken in connection with other sections of the act.

We have already seen how the court below attempted to escape from the effect of section 22 in giving construction to the other sections of the act bearing upon the present case. Both of the judges below said, in substance, that the classes of persons allowed by section 22 to be discriminated in favor of could equally have been discriminated in favor of in the absence of section 22; and that section 22 added nothing to the list of persons who might thus be discriminated in favor of, but simply furnished an "illustration" of the classes that were meant not to come within the provisions of the act, leaving all

other classes, which the common carrier might feel it to be his interest to carry at lower rates, to be, equally with those named in section 22, so carried; that the enumerated persons in section 22 are not, therefore, "exceptions" to sections 2 and 3 of the act, but are simply *examples* of the much more numerous classes that may be so favored.

We have seen that the decisions of the courts, made under this new statute, in so far as they have encountered this question, have, without exception, decided this point the other way. For example, in the case *Ex parte* Koehler, decided by Justice Deady, in the circuit court for the district of Oregon, July 4, 1887, reported in 31 Federal Reporter, page 315, it is decided exactly the other way. He says (*supra*) that—

> Section 22 of the act contains some specific *exceptions* to the operation of section 2.

He then quotes the pertinent part of section 22, and adds—

> The language of the *exception* is explicit. *There is no room for interpretation or construction.* The words can not be made to include the family of an employé without violence to the apparent purposes of the legislature.

He therefore held that when section 22 excepted from those who could not be favored by lower rates the employés of a railroad, such exception *excluded* the "family" of such employés; and although there might be powerful reasons why the child of a president of a road ought to be allowed to pass free along with the father, yet those reasons must be addressed to Congress, and not to the courts,

which are bound to obey and enforce, and are not permitted to *make*, the statutes.

Now, we submit that this position of Judge Deady is vindicated by the entire purview of section 22, taken along with the other material sections of the act.

It is somewhat in the nature of "a dispute about mere words" to contend about whether the enumerations contained in section 22 are, technically, in the nature of "exceptions" or not. They are at least *legislation;* and they are legislation which unmistakably declares that the classes there enumerated shall not come under the prohibition of section 2. Now, whether you call these "exceptions" or not becomes totally immaterial, because they are at least *a legislative interpretation by Congress of the meaning and design of the entire act in the particulars covered by section* 22.

Whether you call this withdrawal by section 22 of the enumerated classes from the operation of the act "exceptions," or call them something else, is totally immaterial, because section 22 is in every possible view one *interpretative* of the entire act.

Now, what is the rule of interpretation applicable to sections or acts interpretative of the statute in question?

Endlich on the Interpretation of Statutes (ed. of '88, p. 510) states this rule of interpretation thus:

> A construction put upon an act by the legislature itself, by means of a provision embodied in the same, that it shall or shall not be construed in a certain designated manner, *is binding upon the courts, although the latter, without such direction, would have understood the language to mean something different.*

Citing—

Smith v. *State* (28 Ind., 321).
United States v. *Gilmore* (8 Wall., 330).
Railroad v. *Catawissa Railroad* (53 Pa. St., 20).
Bird v. *State* (57 Miss., 243).

Here, then, is a legislative order, binding upon the courts, that the classes of persons exempted by section 22 from the equality clause in section 2 shall not come within that section, no odds what might have happened in regard to their exemption but for section 22.

That being the effect of section 22, ought that effect differ from what it would be if it had used the words "are excepted from section 2?" In both cases they are, as a matter of law and fact, withdrawn and excepted from those whom section 2 prohibits from receiving reduced rates.

Now, as tending to show that Congress regarded these classes as coming within the prohibition of section 2 but for the provision contained in section 22, consider first that the introduction of section 22, in the view of the court below, was utterly useless, and you give section 22 no efficient effect whatever; this because the court says these exceptions, so enumerated in section 22, could have been made under section 2 the same as at common law.

So interpreting this act is against one of the most familiar as well as the most valuable canons for interpreting statutes, namely, that you shall give *some* proper force and meaning, if it be possible, to all parts of the statute, and shall not treat any provision as having no meaning or effect.

Then look at the *detail* and *particularity* with which section 22 goes over and ennmerates, one by one, the classes which it withdraws from the operation of section 2 and the other sections of the act. These classes, so withdrawn, are (1) freights for the United States, (2) freights for States, (3) freights for municipal governments, (4) freights charitable purposes, (5) freights to and from fairs for exhibition, (6) fares for carriage of destitute persons transported by charitable societies, (7) fares for homeless persons transported by charitable societies, (8) necessary agents employed for making such transportation, (9) mileage tickets, (10) excursion tickets, (11) commutation passenger tickets, (12) for transporting ministers of religion, (13) municipal governments for transportation of indigent persons, (14) inmates of national homes for disabled soldiers, (15) inmates of State homes for disabled soldiers, (16) transportation of soldiers to State or national homes, (17) transportation of sailors to State or national homes, (18) also those about to enter such homes, (19) those discharged from homes, (20) employés of railroads, (21) exchange of passes and tickets may be made between officers and employés of different railroads, (22) all *remedies* existing at common law.

Now, it is in effect said by the view which we oppose that all this particularity of enumeration was useless and senseless, because all these exemptions could have been made without any such enactment.

Stated in another way, that neither section 2 nor any other part of this act takes away from the carrier and his customer the power to contract for lower rates to the same extent as they could at common law, and that the purpose

of Congress in enacting section 22 is fully satisfied by making the section to be designed to do no more than enumerate, out of the endless and infinite mass of things that may be so favored with lower rates at common law, those named in section 22, lest these should be forgotten or overlooked, and that this enumeration is simply "illustrative and not exhaustive." (Rec., p. 253.)

Now, whilst the maxim "Expressio unius est exclusio alterius" is not one made of steel, nor will it prohibit the courts from getting at the real designs of the act which is being construed, yet the rule is one that has stood the test of centuries, and is, by all enlightened courts, abided by as a general rule in interpreting statutes.

It is said in Broome's Legal Maxims (side page 652) that this rule is one which lays down "one of the first principles applicable to the construction of written instruments." Among the numerous instances given of the application of this rule in Broome are the following:

Where a lease contains an express covenant on the part of the tenant to repair, there can be no *implied* contract to repair arising out of the tenancy (59 Eng. Com. Law Rep.); also that an express covenant for quiet enjoyment will restrain the extent of all implied covenants in that regard; *Line* v. *Stephenson* (5 Bing. N. C., 183, 35 Eng. Com. Law Rep.) and other cases cited.

So where parties by their written engagement have made express stipulations, such express stipulations will not be added to by implied ones, the presumption being that, having expressed some, *all* are expressed.

So in section 397 of Endlich on Interpretation of Statutes it is said that where an act gave to courts equity

jurisdiction in a particular case on a particular class of accounts, and a specification of the act conferred upon them chancery jurisdiction, it was held that the latter act, though broad enough to include *all* cases of accounts, should be understood as relating to accounts not within the former act, and, hence, as not working a repeal thereof; also that, where a statute specifies the effect of certain provisions, other effects are to be held as excluded.

The same section adds that—

> It has been said that an exception made by the statute itself excludes *all* other exceptions.

Citing—

14 Pennsylvania St. (403).
29 Pennsylvania St. (226).
93 Pennsylvania St. (129).
45 Mississippi (247).
10 Minnesota (32).

In *Miller* v. *Miller* (44 Pa. St., 170) it is laid down that where the legislature has undertaken to enumerate the cases in which a married woman may sue, "*all others* are omitted and *expressio unius est exclusio alterius* is a sound legal maxim."

So it is said in the same section (397) that where a statute specifies the effect of a certain provision other effects are to be held excluded. *Perkins* v. *Thornpugh* (10 Cal., 189).

So where an act repeals expressly a particular provision or section of another act, there can be no implied repeal beyond that. *State* v. *Morrow* (26 Missouri, 131); *Purcell* v. *Insurance Company* (42 N. Y., 383).

So, also, in the same section, it is added that an enumeration of cases, in which, for example, interest may be recoverable, excludes such recovery in others (20 Arkansas, 410).

So, also, in the same section it is said that a power given to national banks loaning money on personal security excludes the power of taking any other, as, for example, mortgages (72 Pa. St., 461).

To the same effect is *McRoberts* v. *Washburn* (10 Minn., 23).

The same general effect is in *State* v. *Taylor* (15 Ohio St., 137).

It has been well said in several cases that exceptions are intended to restrain the enacting clause; to except something that would otherwise be within it, or in some manner modify it.

Voorhees vs. *Bank of United States* (10 Peters, 449).
Wayman vs. *Southard* (10 Wheaton, 1).
Savings Bank vs. *United States* (19 Wallace, 229).
United States vs. *Dickson* (15 Peters, 141).

This doctrine is carried so far that the fact of exception strengthens the other clauses, because it has been said that where there is a prohibition granted or regulation in general words, and a saving of particular things, there is a strong implication that what is exception would have been within the purview if it had not been excepted, and thus the purview is by the exception made more comprehensive than it otherwise would have been.

Gibbons vs. *Ogden* (9 Wheaton, 191).
Brown vs. *Maryland* (12 Wheaton, 438).
United States vs. *Gilmore* (8 Wallace, 330).

In Viner's Abridgment, Title H, Grants 13, p. 61, it is said in illustration of this doctrine that the exception makes the purview more comprehensive than it otherwise would have been.

> Thus, if there be a grant of all the trees on a piece of land, which, if nothing had been said, would only have embraced forest trees, but there is an exception of apple trees, other fruit trees, as peach and pear trees, will pass.

Hence, it is said the proviso will be restricted to the enumerated exceptions, in the absence of anything in its terms evincing an intention of giving it a broader effect, and these exceptions are to be strictly construed.

United States vs. *Babbitt* (1 Black, 55).
United States vs. *Dickson* (15 Peters, 141).

The testimony, as has been seen, demonstrates that among the reduced-rate tickets well known at the time of the passage of the law were mileage, excursion, commutation, and party-rate tickets, each of the foregoing belonging to a separate and distinct class.

This section is a good illustration as well of the doctrine alluded to, *ante*, that exceptions strengthen the force of a general law and also that an enumeration of excepted things weakens the effect as to those not enumerated.

Page v. *Allen* (58 Pa. St., 338, 346).
Ex parte McCardle (7 Wall., 506).

Exceptions made by the statute itself exclude all other exceptions.

Brocket v. *R. R. Co.* (14 Pa. St., 241).
Miller v. *Kirkpatrick* (29 Pa. St., 226).
Olive Cem. Co. v. *Phila.* (93 Pa. St., 129).

Dryfus v. *Bridges* (45 Miss., 247).
McRobbins v. *Washburn* (10 Minn., 23).
Perkins v. *Thornburgh* (10 Cal., 189).
Walkins v. *Wassell* (20 Ark., 410).
State v. *Jaeger* (63 Mo., 403).
Niemeyer v. *Wright* (75 Va., 239).
Jenkins v. *Ewin* (5 Heisk., Tenn., 456).
State v. *Taylor* (15 Ohio St., 137).
Cherokee Nation v. *Georgia* (5 Peters, 1).

For reasons which are quite apparent it was not considered by Congress that mileage tickets, which were used at the time of the passage of the law by commercial travelers, excursion tickets, which were for the convenience of patrons upon special occasions, and commutation tickets, in use by the suburban residents near our large cities, although forbidden by the equality clause of the second section, were within the reason that prompted the passage of the law.

Another rule akin to the rule *expressio unius est exclusio alterius* is thus stated in Endlich on Interpretation of Statutes (sec. 216, p. 288). He says:

> So where there are in an act *specific* provisions relating to a *particular* subject they must govern in respect to that subject as against *general* provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.

Citing—

> *Phelps* v. *Phelps* (19 Wisconsin, 193, and 22 Wisconsin, 363).

Applied to the case at bar, this rule means that the particulars specified in section 22, as to the classes that may be favored, exclude the general provisions of the act, as well as of the common law, under which more numerous exceptions may be made.

Again, in this connection, in regard to the bearing of section 22, it must be carefully remembered that the original act of 1887 provided, in section 22, that nothing in the act should *apply to* the carriage, storage, or handling property from or at reduced rates for the United States, etc., going through the entire list now mentioned in the section 22 as amended by the act of March 2, 1889.

The amendment makes it read that nothing in this act *shall prevent* the carriage, etc. The change is very important. The original section prevented any provision of the act from applying to the large number of classes and cases named in the twenty-second section, and *deprived all these classes of the benefit of all parts of the law.* As amended, the entire law applies to the enumerated classes, with the exception that it authorizes carriers, as against any provision in the law, to make the named exceptions.

The importance of this change in the statute is in this:

1. That it shows that the *attention* of Congress has been repeatedly directed to this section 22.

2. It shows that it was the deliberate design of Congress to allow *all* the provisions of the act to control the classes enumerated in section 22, as well as all others, with the *single* exception that it allowed carriers to grant reduced rates to a specifically enumerated class.

After all this care and solicitude by Congress in regard to these enumerated classes being put under the provisions

of the law in every respect, except one respect, and in that respect being allowed to be the recipients of reduced rates in the specified cases, to say that Congress means nothing by it, and that the same classes and all other classes might have been made the recipients of these favors, is not to construe this section, so solicitously and repeatedly considered and modified by Congress, but to *ignore* it.

We leave, therefore, here the discussion of the text of this statute, confidently submitting to the court that that text itself renders it impossible to hold that it was the design of Congress to suffer carriers to fix reduced rates for transportation on party tickets of passengers without regard to the equality required by section 2 in cases of "like transportation made under substantially similar circumstances and conditions," and the transportations which are the subject of the present controversy were of the character named in section 2 as to their sameness.

FURTHER AUTHORITIES ILLUSTRATIVE OF EQUALITY CLAUSES IN STATUTES.

We have hitherto introduced a class of authorities which cover all aspects of the present case, by which we especially designed to show that, under the equality clauses of the interstate-commerce act and all other analogous legislation the mere fact that the rate charged for transportation may be no more than compensatory, it may yet be violative of such equality clauses, where there are unequal rates charged for like services under similar circumstances and conditions.

We now turn to the presentation of further authorities in establishment of the broad and general proposition that

these equality clauses, in the various statutes, requiring equality of charge for like services under similar conditions, have been by the courts so generally interpreted, and that that interpretation is one which will not authorize, as at common law in England, discriminations by allowing lower rates in cases like, or substantially like, the one at bar.

In entering upon this further citation of authorities it is worth while to observe, at the outset, that no decisions have been by us found, nor do we think any are in existence (other than those we have already cited in another connection) that give interpretation to this very interstate-commerce act. We mean decisions outside of the Commission itself.

It must be true, therefore, that in the further presentation of authorities nothing can be done better than to examine how the courts have construed the equality clauses in the statutes of the various States that are the most like sections 2 and 3 of the interstate-commerce act.

There is in *Schofield* v. *Lake Shore, etc., Railroad Company*, decided in 1885 (43 Ohio St. Rep., 571), such a presentation of the American cases, as well as the English, as, because of its fullness and its extent, brings together all the authorities, substantially, which we care to add in this argument, to the cases we have gone over. We therefore resort to that case as a convenient method of getting at the authorities, but have examined the court's citations in the original reports themselves and find that the use made of the cases by the court is warranted by the cases.

We therefore set forth this case from 43 Ohio with its citations (except the cases we have elsewhere noticed) pretty fully.

This case was decided in 1885, was carried up from the district court of Cuyahoga County, and the Supreme Court unanimously affirmed the decision of the court below. It was most elaborately argued on both sides, and the authorities, up to the date of the decision, seem to have been fully presented and reviewed both by counsel and by the court. There is an extended finding of facts as they were found in the case, extending from pages 576 to 584.

The sections of the Ohio statute which were brought into view in that decision are sections 3366, 3367, 3373, and are set forth on pages 614, 615, of the decision of the court.

At the top of page 614 the court says, in regard to the bearing which these Ohio statutes had upon the decision of the court:

> I think they can, at least, be looked to as indicative of the *tendency* and *direction* of the legislative policy of the State upon the questions we are investigating.

Further, on page 615, the court says:

> If the unlawful acts of discrimination in freight charge complained of in this case come within the inhibition of these statutes nothing need be proved beyond the acts, and it need not be shown that the acts themselves were injurious to the plaintiffs.

It will be seen that there is no equality clause in these sections such as is found in section 50, under which the case of *Sutton* (cited *supra*) was decided, and such as section 2 in the interstate-commerce act.

But section 3373 contains the following provision:

> SEC. 3373. No company or person owning, controlling, or operating a railroad, in whole or in part, within this State, shall charge or receive, for transportation of freight, for any distance within this State, a larger sum than is charged by the same company or person for transportation in the same direction of freight of the same class or kind for an equal or greater distance over the same road and connecting lines of road.

The suit was by one dealer in and shipper of coal oil, located at Cleveland, Ohio, and was against the Standard Oil Company, a similar manufacturer and dealer. The latter was an enormously large shipper, its being very far in excess of the plaintiff's shipments from the same place. The substance of the petition was that the plaintiff and all other dealers in and shippers of oil were charged by the defendant its schedule rates for freight on oil, and that that was far in excess of those charged to the Standard Oil Company, both being shippers of the same commodity over the defendant's lines, from the same place and at the same time; that the two were competitors in trade, and that the Standard Oil Company was plaintiff's principal competitor; that to allow the Standard Oil Company said advantage in rates was ruinous to plaintiff's business and rendered it impossible for plaintiff to comcompete with the Standard Oil Company; and that the defendant refused to give the plaintiff the same rates, and that this discrimination inflicted on plaintiff irreparable injury, and prayed for an injunction restraining the con-

tinuation of said inequality of rates and that plaintiff have the same rates as were given to the Standard Oil Company for like service.

The court below granted the relief prayed for (the common pleas), whence it went to the district court by appeal, and that court, considering that important questions were involved, reserved the case for decision in the Supreme Court of the State.

At the beginning of its opinion the court says:

> The main question in this case, and to which all others are subordinate, is this: has the defendant a right to discriminate between its freighters and customers, and furnish transportation to one at a less rate than to others, in a case where such discrimination is injurious to and destructive of the legitimate business of others?

The court adds that

> This question involves the subordinate questions—(1) What were the rights and duties of common carriers at common law, and was the shipper entitled to have his goods shipped at a rate equal to that charged to others, or was he entitled to any protection other than to have his goods transported for a reasonable compensation? (2) What changes, if any, have been made by the statute in this State touching the duties and liabilities of a common carrier at common law? (3) Is the contract made between the defendant and the Standard Oil Company mentioned in the pleadings (one by which defendant agreed to carry the Standard Oil Company's oil to markets at prices averaging about ten cents per barrel less than tariff rates charged to the rest of the public, page 574) good in law or is it void on grounds of public policy?

(4) Can the remedy sought by the plaintiffs in this case be administered by courts of equity by means of an injunction?

The following proposition, stated in the head-note, presents accurately what the court decided and is the act of the *entire court* (see Rule 6, p. XXIV, same volume):

1. A railroad company, organized under the statutes of Ohio, is a common carrier, and is subject to the legal control to prevent the abuse of its powers and privileges.

2. Where a lower rate is given by such corporation to a favored shipper, which is intended to give, and necessarily gives, an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an *equal rate for all under like circumstances.*

3. Where such a corporation as a common carrier, in consideration of the fact that a shipper *furnished a greater quantity of freight than other shippers during a given term*, agrees to make a rebate on the published tariff on such freights to the prejudice of the other shippers of like freights under the same circumstances: Held, such a contract is an *unlawful discrimination in favor of the larger shipper* tending to create monopoly, destroy competition, injure, if not destroy, the business of the smaller operators, contrary to public policy, and will be declared void at the instance of parties injured thereby.

4. Such a contract of discrimination *can not be upheld simply because the favored shipper may furnish for shipment during the year a larger freightage in the aggregate than any other shipper, or more than all others combined.* A discrimination resting exclusively on *such* a basis will not be sustained.

5. Although a court will ordinarily look to the interest of a common carrier as an element in the case where a contract with him relating to freightage is attempted to be upheld or set aside, such a contract will not be sustained by the courts simply because the business to be done under it is "largely profitable" to him.

6. Where it appeared that the plaintiffs' business was such as to make them frequent shippers, and that a continual series of shipments was necessary in conducting their business, and that a remedy sought by actions at law would lead to a multiplicity of suits: held, the court will intervene by injunction to prevent a multiplicity of suits, and it is not a prerequisite that the plaintiffs should have first established their rights by an action at law.

7. Where a defendant railroad company is a corporation, consolidated under the statutes of several States, including this State, and its road extends into several States: Held, that its acts of injurious discrimination committed or threatened in this State to the business of shippers, either here or along the line of its road, may be enjoined by the courts of this State.

The cases cited by the court below in its elaborate opinion, and which seem to bear most materially upon the case at bar, are, amongst others, the following, as tending to show the extent of the power of legislatures over corporations exercising the functions of a public and common carrier in virtue of grants by the legislature.

Commissioner v. *Railroad Company* (63 Me., 269–278).

Rex v. *Barker* (3 Burr., 1267).

State v. *Railway Company* (29 Conn., 538).

Commonwealth v. *Railway Company* (103 Mass., 258).

Railway Company v. *Railroad Commission* (103 Mass., 275).

Sanford v. *Railway Company* (24 Pa. St., 378).

Messenger v. *Railway Company* (36 N. J. Laws, 407).

Talcott v. *Township* (1st Flippin, 120).

McDuffie v. *Railway Company* (52 N. H., 430).

Railway Company v. *Casey* (26 Pa. St., 287).

In support of the proposition that these *quasi* public agents are required to treat all citizens and customers *alike* as to the terms upon which they will transport freight the court cites numerous authorities.

In regard to this question in England, at bottom of page 598, the court uses the following language and cites the following authorities:

> The question, so far as it related to railroads, was settled by statute in England shortly after their introduction there; and under the equality clauses of English statutes railroad companies were bound to charge equally to all persons in respect to all goods under like circumstances. *Pickford* v. *Railway Company* (10 M. & W., 399); *Backsendale* v. *Railway Company* (L. R., 1 Ex., 137); *L. & N. W. R. Co.* v. *Evershed* (26 W. R., 863).

In support, amongst other things, of the proposition that the American view of our common law in these States, however it may have been in England, is that such common law here requires substantially the same degree of equality of charge for freights and fares as is required under the statutes and the decisions in England, the court

cites, amongst others, *Railroad Company* vs. *People* (67 Illinois, 11–17), commented upon *supra.*

Messenger v. *Pa. Ry. Co.* (36 N. J. Law, 407, 412), commented on *supra:*

He then adds (599, 600) that—

> In some of the cases it is announced that upon the question whether the law requires the common law carrier to transport goods upon equal terms to all, or whether it only requires that the rate shall be reasonable, but not necessarily equal to all, has been differently determined by the courts of both England and America. (*Ragan* v. *Aiken*, 9, B. J. Lea, 609; s. c., 42 Am. Rep., 684.)

The court then adds the following:

> Be that as it may, the tendency and *undoubted weight* of the authority is in favor of the doctrine that a common carrier is charged with a quasi public duty to transport merchandise on *equal terms* for all parties where the carrying for some shippers at a lower price than for others will create a monopoly by injuring or destroying the business of those less favored.

To this he cites *Messenger* vs. *Pa. Ry. Co.* (*supra*, p. 410 of 36 N. J. Law); also the case between the same parties (37 N. J. Law, 531).

To the same general effect he cites *McDuffie* vs. *Railroad* (52 N. H., 447, 450, 451, 453), all going to the point that *inequality* of charge is, in this country, 'unlawful where it involves "unreasonable discrimination and a violation of common right."

Next he cites (p. 603) *Sanford* vs. *Railroad* (24 Pa. St.,

378, 380, 382), with long extracts from the opinion in that case, the substance of which is embodied in this sentence:

> If the public are entitled to these advantages it results from the nature of the right that the benefit should be *extended alike to all*, and that *no special privileges* should be granted to one man or set of men and denied to others.

He next cites (p. 604) *Shipper* vs. *Railway Company* (47 Pa. St., 338) and quotes from that case the following:

> There is no express stipulation that the rates shall be equal to all who may offer goods for transportation over the road. * * * Such stipulations are common in English railway charters. They are, however, *but declaratory of what the common law is.*

He next cites (p. 604) *Audenried* vs. *Railway Company* (68 Pa. St., 370), and quotes from the court, as found on page 380, the following:

> Transportation by a common carrier is necessarily open to the public upon *equal* and reasonable terms.

The next case he cites (p. 604) is *Express Company* vs. *Railway Company* (57 Me., 188). He says this was a case where the facts were like those in *Sanford* vs. *Railway Company* (24 Pa. St., 378), and where the suit was for a refusal by the defendant to carry goods for plaintiff, owing to a contract which the defendant had made with another company to give it the exclusive right to carry express matter on its cars. It then quotes the following from this case in 57 Me. (pp. 604 and 605):

> Common carriers are bound to carry *indifferently*, within the range of their business, for a reasonable compensation, all freight offered. For similar *equal*

> services they are entitled to the *same* compensation. * * * They can not legally give undue and unjust preferences, or make *unequal* and extravagant charges. * * * A toll is granted. But a toll implies *uniformity* of compensation for *equality* of service. * * * The very *definition* of a common carrier excludes the idea of the right to *grant monopolies or give special and unequal preferences.* * * * The defendants derive their chartered right from the State. They owe an *equal* duty to each citizen.

The next two cases cited are 49 Illinois, 33, and 56 Illinois, 365. These cases we have presented already in what we have taken *supra* from *Railway Company* vs. *People* (67 Illinois, 11 and 17).

The next cases he cites are *Dinsmore* vs. *Railroad* (2 Fed. Rep., 465), where he says two similar cases were disposed of by Baxter, J., and he quotes (p. 606) from Judge Baxter, on pages 469 and 476, as follows:

> And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. * * * All are entitled to the *same* measure of accommodation who may offer to do the *like* business and it is the duty of the court to enforce, whenever applied to, this legal rule of *impartial* justice.

The court next notices (p. 606) five cases reported in 10 Federal Reporter, 210, which were decided before Justice Miller and Judges McCreary and Treat, coming from different States, and quotes from Justice Miller, where he says, speaking of the duty to treat express matter equally:

> And the use of these facilities should be extended on *equal terms* to all who are actually and usually engaged in express business.

He next cites the case of *Hayes* v. *Pennsylvania Company* (12 Fed. Rep., 309). The case was decided by Baxter, J., in the northern district of Ohio, and was one where the defendant gave to Standard Oil Company lower rates, on account of the immense amount of business it did over defendant's road, and claimed that its contract with the Standard Oil Company, making this discrimination, was justified by the immense amount of business furnished to defendant. This resulted in compelling the plaintiff in the case to pay higher rates. There was a verdict for the plaintiff, and, on motion for new trial, the judge used the following language:

> The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for the public uses, and is, in a qualified sense, a public highway. Hence, everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an *equal* and impartial participation in the use of the facilities it is capable of affording.
>
> The discrimination complained of rested exclusively on the *amount of freight supplied by the respective shippers during the year.* Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree subject to the will of the railroad officials, etc.

The court here quotes, at considerable length, from this opinion by Justice Baxter, showing the ruinous consequences that would come from a failure to extend *equal* facilities to all.

Speaking of the position of the Standard Oil Company claiming this preference by way of lower rates, the court says (still quoting from Justice Baxter):

> It (the Standard Oil Company) possesses inherent advantages which can not be taken from it. But it has no just claim, by reason of its accumulative strength, to demand the use of the public highways of the country, constructed for the common benefit of all, *on more favorable terms than are accorded to the humblest of the land;* and a discrimination in favor of parties furnishing the *largest quantity of freight, and solely on that ground, is a discrimination in favor of capital,* and is contrary to sound public policy, violative of that *equality* of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

To the same effect the court cites (p. 609) *Crawford* v. *Wick* (18 Ohio St., 190); *Salt Company* v. *Guthrie* (35 Ohio St., 666). The court also reviews many of the English cases, including *Railway Company* v. *Sutton* (4 English and Irish App., 226), and many other cases.

We have thus fully gone over this recent case from the supreme court of Ohio for several reasons:

1. One reason is that it is one of the cases cited by the court below, and seems, therefore, to be relied on as supporting the decision below (Rec., p. 139); and, in view of the character of the case, as we have now seen it, it indicates what *kind* of cases the court below regarded as tending to support its decision, which, in its tendency to defeat the contention of the Pittsburg, Cincinnati and St. Louis Railroad Company against its rival defendant, the Baltimore and Ohio Railway Company, is *one exactly the*

reverse of all these cases cited in *Schofield* v. *Railway Company*, and against the doctrine of the last-named case.

2. Another reason why we have so fully presented this case is that we wished to bring before the court the cases which it cites, and which we have just gone over, with the force of this recent decision in Ohio, in approval of the cases which it cites, *added* to the intrinsic force of the cases themselves.

The suggestions which we wish to make in view of *Schofield* v. *Railway Company*, and of the cases which we have cited, embodied in its opinion, are that—

First. They powerfully vindicate the policy asserted and promoted by the interstate-commerce act, as embodied in the decision of the commission, which was defeated by the judgment of the court below in the present case, a policy earnestly seeking to secure to *all* the people alike *equality* of treatment by and from the powerful monopolies now controlling the commerce between these States.

Second. That they show the drift and tendency of State legislation to be in the same direction with that shown by the interstate-commerce act.

Third. They bring together and exhibit carefully, impartially, and quite fully the character and the tendency of the decisions of courts of this country to be in a direction exactly the opposite of that of the decision in the court below in the present case, to wit, the direction of construing the "equality legislation" of these States regulative of charges by carriers in such way as to secure *equality* of treatment

by the carriers towards all the people and towards all interests and localities where the conditions of the service, etc., are equal.

Fourth. That this case of Schofield, *supra*, and the cases cited powerfully show that this *tendency* of State legislation and of the State decisions is to establish it as the law of this country that that *fair dealing and equality of treatment* which is ordained by sections 1, 2, and 3 of the interstate commerce act (as these sections were interpreted by the order, Exhibit D, in the present case) has become, *if not the common law of this country* (as some of the cases held), substantially the statute law of the great commercial States, as interpreted by the courts of the States respectively, and that these considerations will not be disregarded by this court in reaching its construction of this act, which is to be decisive of the case at bar.

Our desire to contribute to the convenience of the court in its examination of the authorities (should it make such examination) which were cited by the court below, has induced us to resort to fuller extracts from the cases than is usual in these briefs; and that has given to the brief the greater part of its volume.

But, notwithstanding the length to which this discussion has now been carried, we are unwilling to conclude the argument without a pretty full examination of the authorities cited by the court below, which we have not already alluded to and which are mostly English.

We care not about going over the American cases cited on page 139 of the record, except to allude to one or two of them cited from courts generally recognized as belong-

ing to the higher classes of authority. These we may allude to as specimens indicating how illy these cases sustain the decision below.

Killman v. *New York Central Railway* (100 N. Y., 395) decides nothing more than that the plaintiff in that case, who sued to recover unreasonable freight charges made upon his shipments of milk, had assented to those charges under conditions that made his payments voluntary, and, therefore, he could not recover.

What the court says in the nature of "*quære*" about the question whether the charter of the company, in that case, authorizing it to fix its rates, had abrogated the common-law rule requiring reasonableness of charge, the court expressly declines to decide, and what it says about the state of the common law on this point is wholly immaterial in the present case, and, besides, was merely *dictum*.

The case in this court of Union Pacific Railway Company is cited (Rec., p. 134, fol. 282), but that case decides nothing affecting the present case, unless it be what is stated in the last paragraph of the head note, which is:

> The services rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails.

Surely there is nothing in the present case or in the order of the Commission, Exhibit D, or in any decision by the very learned Commission, which makes it necessary for the appellant to controvert this proposition as stated in the head note just quoted.

Most of the American cases cited by the court below we have already noticed, and we now turn to a careful notice of the English cases cited by the court below.

ENGLISH CASES RELIED ON BELOW.

The first English case cited in this opinion by Jackson, J., is *Nicholson et al.* v. *The Great Western Railway Company* (5 C. B. N. S., 366; also reported in Neville & McNamara Railway and Canal cases, 121). This case was decided November 9, 1858, and was, therefore, decided 10 years prior to the case in the House of Lords, of *Great Western Railway Company* v. *Sutton* (4 H. L., 238). If, therefore, the law of this case in the common pleas, where the opinion is by Crowder J., (5 C. B. N. S., 434), differs from that laid down in *Great Western Railway Company* v. *Sutton* (*supra*), it is, of course, overruled.

The law as laid down in the head note of the case, *Nicholson* v. *Railway Company*, is as follows:

> It is competent to a railway company to enter into *special agreements* whereby advantages may be secured to individuals in the carriage of goods upon the railway, where it is made clearly to appear that, in entering into such agreement, the company have only the interest of the proprietors and the legitimate increase of the profits of the railway in view, and the consideration given to the company in return for the advantages afforded by them be adequate, and the company are willing to afford the same facilities to all others upon the same terms. Nor is the second section of the railway-tariff act, 17 and 18 Vict., c. 31, contravened by a railway company carrying at

> a lower rate in consideration of a guarantee of *large quantities and full train loads* at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by diminished cost of carriage, although the effect may be to exclude from the lower rates those persons who can not give such guaranty.

If this case means to decide, in substance, nothing more than that diminished rates may, under the English statutes, be charged for greater quantities of freight *transported at the same time*, then we have no objection to its law. If it means to decide that because a freighter is a *better customer* of a road than others, by reason of shipping *greater quantities through the year*, then this law is not sustained by the later case in the House of Lords, of *Great Western Railway Company* vs. *Sutton*, and is carefully condemned by Justice Blackburn in what he says about the views and decisions of Earle, C. J.

It will be found in what we have above quoted from the opinion of Justice Blackburn, from the case of *Great Western Railway Company* vs. *Sutton* (*supra*), that the House of Lords has expressly *condemned* the views of Earle, C. J., as expressed in his dissenting opinion in the case of *Baxendale et al.* vs. *Great Western Railway Company*, decided 1863 (14 C. B. N. S., 1); and that all the cases that preceded the decision in *Great Western Railway Company* vs. *Sutton* were fully noticed, and, in so far as they differ from the decision in the last named case, were overruled. It will also be seen that, in this last named case, it is expressly held by the majority of the court, as expressed in the head note, that by section 50 of 7

and 8 Vict., c. 3 (the section on which the case of *Great Western Railway Company* vs. *Sutton* was based), the Great Western Railway Company are empowered, whenever they shall act as carriers, to charge for the carriage of goods, etc., such sums as they may think expedient, within the limits pointed out in the acts of every incorporation, *provided such charges are made to all persons equally;* and section 51 authorizes them to enter into such arrangements as they may think fit, with reference, amongst other things, to the collection and delivery of goods.

> By the subsequent act (10 and 11 Vict., c. 226, s. 53) the company are empowered to charge for small parcels, "that is to say, parcels not exceeding 500 pounds in weight," "any sum which they think fit." * * *
>
> *Held*, Upon the authority of *Pickford* vs. *Grand Junction Railway Company* (10 M. & W., 399), *Parker* vs. *Great Western Railway Company* (7 M. & G., 253; 7 Scott, 835), and *Baxendale* vs. *Great Western Railway Company* (5 C. B. N. S., 336) (*dissentiente*, Earle, C. J.), *that the company are still bound to charge equally, and can not lawfully demand for the carriage of parcels from station to station a sum which shall include the cost of collection and delivery, and so impose an unequal burden on those who do not require the performance of these latter services at their hands; and that money had and received will lie to recover back sums demanded and received in excess.*

The court below (Rec., 135, fol. 288) quotes from Chief Justice Earle's language, as found in *Nicholson* vs. *Great Western Railway Company*, the paragraph which begins:

> I take the free power of making contracts to be essential for making commercial profit. Railway

> companies have that power as far as any merchant, subject only (as to this court) to the duty of acting impartially without respect to persons, etc.

Now, it will be seen, from what we have quoted from *Great Western Railway Company* vs. *Sutton*, that this position of Earle, C. J., and his holding, is expressly *condemned*, and the majority of the court, as found in Baxendale, *supra*, is approved.

The next case cited by the court below is the one we have already given, of *Great Western Railway Company* vs. *Sutton* (4 H. L., 226). What that court holds is directly the *reverse* of what it is here cited to establish, as we have seen by our full quotation of the head note, as it appears in the report and by our extracts, including almost the entire pertinent part of opinion of Justice Blackburn in the case.

The next case cited in the opinion of the court below (Rec. 136, fol. 284) is *Hoosier* vs. *Caledonia Railway Company* (1 Neville and McNamara Railway Cases, p. 30).

That case was decided January 20, 1855, and has nothing to do with the present case, as seems to us. What was decided is stated in the headnote, thus :

> A railway company having fixed rates for passengers traveling between the termini of the line, according to a much lower schedule than the rates exigible for passengers traveling between the intermediate stations.
>
> Held : That no one has a title to complain of such proportional rating, unless there is a competition of interest, or unless the complainant set forth personal disadvantages to himself. The mere statement that

> the complainer has frequent occasion to travel upon the railway not being sufficient, questioned whether the provisions of the act apply to the regulating of passenger fares.

In that case, the charter of the company entitled the company to fix, and they had accordingly fixed rates from point to point on the railway, and these rates were charged equally against all parties who had occasion to travel the same distance. In deciding the case, the lord president said:

> It appears to me that the provisions of the railway and canal traffic act *do not apply* to this matter; and I think, also, that the petitioner has not shown any title or interest to maintain the complaint, etc.

Lord Churchill delivered an opinion in the case, wherein he says:

> I would not like to found my opinion exactly on the want of title (in the complainant to file the petition), and I should like, if we went on that alone, to hear more argument regarding it.

From these extracts and the entire case it will be seen that the case decides nothing having the slightest application to the case at bar.

The next case cited by the court below is *Jones* vs. *Eastern Counties Railway Company* (1 Neville & McNamara, p. 45).

The head note of that case is as follows:

> The court refused to grant a rule for an injunction against the Eastern Counties Railway Company, under the railway and canal traffic act of 1854, to compel them to issue season tickets between Colches-

> ter and London on the same terms as they issued them between Hardwicke and London, upon a mere suggestion that the granting of the latter (the distance being considerably greater) at a much lower rate than the former was an undue and unreasonable preference to the inhabitants of Hardwicke over those of Colchester.

The refusal of the court to grant the injunction in that case is indicated by a suggestion made to counsel from the bench by Williams, J. (*p.* 46), who says:

> For anything that appears on your affidavit, there may be *very good reason* for making such difference in price.

Then Willes, J., says to counsel:

> To bring the case within the act, you must show, as we held the other day in the case of Harris and the Cockermouth and Workington Railway Company, that the journeys *are substantially the same.*

Williams, J., then says to counsel:

> At this moment there is active competition at rating between the Great Western and South Western Railways; the consequence is that considerably less is charged for tickets from that place to London, and *vice versa*, than from intermediate stations.

The case is concluded by Williams, J., in these words:

> I am of opinion that there is no ground for the application. The bare facts stated in the affidavit upon which it is founded clearly do not constitute a case of undue preference within the act.

So that it thus appears that this case went off in refusing the order purely and merely upon the fact that the

petition failed to show "that the journeys were substantially the same."

That case was decided long before the case of *Great Western Railway Company* vs. *Sutton* (*supra*).

The next case cited in the court below is *Painter* vs. *Railway Company* (2 C. B. N. S., 702). That case was one where a proprietor of a fly applied for the privilege of plying for hire within the railroad station. His application was refused, the entire opinion being in these words:

> I am of opinion that no ground is presented to justify the interference of the court. Before we can put the powers of the act (railway and traffic act of 1854, 17 and 18 Viet., c. 31) into motion we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is bona fide made on behalf the public.

This case was decided in 1857 in common pleas.

The next case cited in the court below is *Ransome* (printed *Nansome* in Record, fol. 285) vs *Railway Company* (I. C. B., N. S. 436) where Creswell, J., delivers the opinion. The headnote indicates the the character of case and decision, and is as follows:

> In dealing with the first branch of the 17 and 18 Viet., c. 31, s. 2, which prohibits railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or any particular description of traffic, or subjecting any particular person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage * * * , the fair interests of the company are to be taken into account.

> A railway company made an agreement with A to carry for him a large quantity of coals during three years from Peterboro to various places on their lines of railway at certain rates. B, a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various persons on the same lines of railway, and the company charged him a much larger sum per ton in proportion to the distance over which his coals were carried, than they charged to A * * * the professed object of the difference being to enable A (whose coal came to Peterboro by railway) to compete in the coal trade of the district with B, who had the advantage of having his coal brought to Ipswich by sea. * * *
>
> Held, that this was giving an undue preference to A. *Quaere:* Whether a railway company may not charge different rates where coals are carried in large and small quantities, and where they are carried a long and short distance, and where the difference is for the purpose of competing with another line, and where one party provides his own wagons and the other uses those of the company.

This head note being an accurate description of the case, it will be seen that there is nothing in it in contravention to the positions taken by appellant in this case, and that it is, on the main point, directly in favor of the appellant. If there be anything in the case that is in contravention of the law as laid down by the House of Lords in the Sutton case, *supra*, it is overruled, because this case of Ransome, *supra*, was decided in 1857.

The next case, cited in the opinion below (Rec., p. 137), is *Oxlade* v. *North Eastern Railway Company.* (1 C. B. N. S., 454.) This was decided January 30, 1857. There it was held that it was sufficiently made out that the cir-

cumstances enabled the company to carry such coals as cost less to them than the cost of carrying coals and coke for the complainant, and that by carrying them under the circumstances stated at such lower rate no undue or unreasonable preference was given or any undue or unreasonable disadvantage imposed (p. 445.) It was held (*id.*) that a desire to introduce the Northern coke into Staffordshire, and the lowering of rates for that purpose, was giving an undue preference to the particular traffic, there being no special circumstances affecting the pecuniary interests of the company to justify that course.

This case amounts to nothing more than a decision that a company may vary its rate for transportation according to the bona fide and necessary cost or expense of making the transportation, a proposition which, so far as known, is not denied in this country or in England.

This case, too, it will be observed, was decided some eleven years before the case of Sutton, *supra*, and therefore, in so far as it may differ from the law of that case, if it does, as we think not, it must be regarded as overruled.

The next case cited is the one which we have already cited, *Nicholson* v. *Great Western Railway Company*, and we have sufficiently noticed that case.

The next case cited is *Bellsdyke Coal Company* vs. *North British Railway Company* (2 Neville & McNamara, 110). This case was decided in 1875, and the head note indicates the character of the case and the decision, and is as follows:

> A railway company entered into an agreement with a firm of colliery owners to carry their coal at certain

rates, lower than those charged other colliery owners with whom they had no agreement. The railway company attempted to justify the preference on the ground that the traffic covered by the agreement was more costly to carry, in consequence of a steep descending incline from the collieries to the main line. The higher rate was imposed whichever direction the coal traffic took, while it passed down the incline in going in one direction only:

Held, that a charge purporting to be in respect to a special service—such as in respect to the inclines—should not have its incidents extended to traffic for which that service was not performed, and that payment in respect to such incline should, under the circumstances, take the form of a fixed reasonable toll, payable only for the traffic using the incline.

A railway company pays no more than a due regard to its own interests if it charges for its services in proportion to their necessary cost.

It is not a valid consideration for the reduced rate that the party favored is a customer also of the same railway company in goods of a quite different kind.

This position amounts to simply what we have just said is not disputed, so far as we know, either in England or in America, to wit, that railways may adjust their charges, keeping within statutory limits, to the necessary and bona fide cost or expense of making the transportation, without being amenable to the charge of unreasonableness or injustice.

The next English case cited in the court below (Rec., p. 137, fol. 286) is *Baxendale* v. *Great Western Railway Company* (5 C. B. N. S., 336). This case seems to be cited for the purpose of making two extracts from the opinion of Cockburn, C. J., found in the record at folios

286–287. If the chief justice, by the language here quoted, means to say that a customer is to be favored whose business, extending through periods of time, shall exceed that of others extending through the same time and under the same conditions then the language is neither sustained by what is required to be decided, and is decided in the case, nor is it good law in England or America. If it means that if larger shippers ship at the same time, as, for instance, carload, a less charge may be made than for similar quantities, less than carloads, then nobody disputes the proposition. It is this last meaning which we think is required, by the character of the decision and the opinion, to be given to the language quoted on page 135 of the record.

Should the court care to investigate this case we beg that the entire opinion may be read, for it is one which powerfully enforces the equity and equality aimed at by the English statutes in question and by the interstate-commerce law.

It would be difficult to find in our legal literature a more forcible statement of the rule forbidding favoritism towards great monopolies, or partiality as between customers and these common carriers, than is found in this opinion from which this extract is made, and how strong the case is in favor of the position of appellant in the present case will be seen by the following, which is the entire head note in the case. The case was decided years before the case of Sutton (*supra*):

> It is competent to this court under the railway traffic act (17 and 18 Vict., c. 31, s. 2) to interfere to prevent a railway company from fixing the rate of

tolls to be taken on the railway with a view to the promotion of their own interests where their doing so subjected others to unreasonable disadvantage, or operates to their prejudice, by giving undue preference to third parties.

Down to a recent period the Great Western Railway Company charged a uniform rate of 3*s*. 6*d*. per ton on all goods in a particular class conveyed on the railway between their station at Reading and Pattington. These goods were collected and delivered (principally) by the complainants at a charge of 4*s*. 10*d*. per ton. The company raised their charge for carrying goods under 500 pounds weight to 8*s*. and 4*d*. per ton, being the aggregate of the former charge for carrying and that for collecting and delivering with an intimation to the public that they were collecting and delivering goods free of all charges. The real purpose of this arrangement was made apparent to the court to be to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business and the profit upon it to themselves as well as to exclude the complainants from competing with them in this department of business.

Held, That the complainants were entitled to their injunction—the above agreement being objectionable both as an undue preference given on the one hand and as an unreasonable disadvantage imposed on the other; for, that it was an undue preference of the company in their separate capacity of carriers other than on the line of railway inasmuch as they thereby secured to themselves the entire monopoly of the last-mentioned traffic to the entire exclusion of the defendant, and all others; and it was an undue prejudice and an unreasonable disadvantage imposed on the complainants inasmuch as their goods and those of persons employing them, as indeed the goods of all

persons other than those who employed the company to collect and deliver must be subjected as compared with the goods of the latter twice over to the attendant on the collection and delivery if they were required to collect and deliver for them or to an unnecessary charge if they required no such accommodation.

The only other English case cited in the court below (Rec. fol. 288) is *Denaby Main Coaling Company* v. *Manchester, etc., Railway Company* (11 App. Cas., 97), decided in the House of Lords December 17, 1885. This is the last case cited in the opinion of Justice Jackson and is an important one. The head note is as follows:

> The provisions of section 90 of the railway clauses consolidation act of 1845 (8 and 9 Vict., c. 20), requiring equality of rates for carriage of goods "passing only over the same portion of the line of railway under the same circumstances," apply only to goods passing between the same points of departure and arrival and passing over no other part of the line. A mere inequality in the rate of charge, when unequal distances are traveled, does not constitute a preference inconsistent with the concluding words of that section.
>
> Therefore, where a railway company carried coals from a group of collieries, situated at different points along their line, and charged all the collieries with an uniform set of rates in respect to such carriage, and the owners of the colliery lying nearest to the point of arrival, brought an action for over charge:
>
> *Held*, Affirming in this respect the decision of the court of appeals, that the railway company had not infringed the provisions of section 90 of the railways clauses consolidation act of 1845.

Held, Also, that in this case an action did not lie for breach of section 2 of the railway and canal traffic act of 1854 (17 and 18 Vict., 31), undue or unreasonable preference or prejudice not having been made out.

Quære, whether under any circumstances an action lies for breach of that section.

Where goods are carried for different customers over the same portion of the line of railway, the fact that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade or open up new markets, and so to increase the tonnage, carried, does not constitute a difference in the circumstances so as to justify inequality of rates.

Therefore, where a railway company carried coals over the same portion of the line to G, both for the appellants and also for B and allowed B, 8*d* per ton in respect to all coal carried to B and there shipped for the West India market, and also allowed B 6*d* per ton in respect to all coal carried to G and there shipped by him to certain ports, in consideration of a bona fide undertaking by B to develop the trade to these ports, to provide the vessels, and to run the risk incidental to the working of such traffic:

Held, Affirming in this respect the decision of the court of appeals, that the coals were carried under the same circumstances, and that the allowances were breaches of the ninetieth section of the railway clauses consolidation act of 1845.

Held, Also, reversing in this respect the decision of the court of appeals, that the appellants were entitled to recover the overcharge by action against the company, the amount to be ascertained by finding what quantity of coal carried under the same circumstances

and over the same portion only of the line was charged at a higher rate to the appellants at the time the lower rate was charged to B.

A railway company which carried coals to appellants and also for B and J "over the same portion of their line of railway," and made allowances and rebate to B and J, proved that they carried for B and J at less cost to the company, but do not show that the allowances and rebate were adequately represented by the saving to the company.

Held, Affirming in this respect the decision of the court of appeals, that the difference in cost constituted a real difference in the "circumstances"; that, there being nothing to show any want of good faith, the company were not bound to prove that the allowances and rebate were adequately represented by the saving, that there was no breach of section 90 of the railway clauses consolidation act of 1845, and that the appellants could not maintain an action for overcharge under that section.

We have thought it best to give at very considerable length the head notes of this case, because it is the latest case from the House of Lords which we have found covering the points in the syllabus just quoted. It will be found by a careful examination that it fully and carefully reaffirms the doctrines which we have seen laid down in the Sutton case (*supra*). It will be found useful in defining what are the same circumstances, and that these definitions, so far as they go, sustain the present position of appellants. Several opinions are delivered in the case by the lords. The following (pp. 119, 120), in the opinion by Lord Blackburn, shows in what regard the court still holds the law as laid down in the Sutton case. His lordship says:

But it appears from the statement that, though some of the goods were carried only on the same portion of the line, there were others, more especially those mentioned in part 2 of the special case, that were not so carried. And here there is a difference of opinion between the Queen's bench decision and the court of appeal as to the construction of the act of 1845.

I think it finally settled by *Great Western Railway Company* vs. *Sutton* (L. R., 4 H. L., 226) and by *Eversheds case* (3 App. Cas., 1029), that for passing over the same portion of the railway (a fact which was not disputed in either of the cases) the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances," and that the circumstances are those relating to the carriage of the goods, not the person of the sender; that the fact that the persons who are charged with less are, as in Evershed's case (3 App. Cas., 1029), so constituted that they can go by another road, and probably will do so, if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge. Neither is it a difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade.

So, in the opinion by the Earl of Selbourne (pp. 115, 116), the opinion reads:

I can not think that the circumstances under which the six pence per ton were allowed, as stated in the paragraph 16 of the special case, ought to make any difference. All these coals are proved to have been carried only "over the same portion of the line and under the same circumstances" as the appellant's coal. The motives and reasons for making these allowances

are plainly not material, as against the appellant's claim to have their coals carried on the same terms.

The opinion of the majority of the judges in *Sutton's case* (4 H. L., 236), delivered by Blackburn and adopted by Lord Chelmesford, Lord Cairnes, and Lord Colonsay, and that of the whole court in *Oxdale's case* (1 C. B. N. S., 496), on the Staffordshire traffic, to which may be added *Eversheds case* (3 Appeal Cases, 1029), seem to me decisive on this point.

What we have now gone over embraces the entire body of the English cases relied on below, and it shows two things in regard to these cases. One, that where the cases differ from the law as laid down in the leading case of Sutton (*supra*) the cases are overruled by that case. The other thing that appears by a review of those cases is that in a portion of them the law agrees with that laid down in Sutton and that in all of the cases which are subsequent to the Sutton case that case is followed.

It moreover appears by the review that we have presented of these cases that there is nothing in any one of them that is in any degree in conflict with the proposition of law which we maintain in the present case, namely, that if carrying at the same time, under substantially similar conditions, over the same line of road, the same things, or substantially the same things, no such circumstance as is relied on in the present case to justify the party tickets is allowed to justify the reduction of rates.

THE ATTORNEY-GENERAL OF THE UNITED STATES,
SAMUEL SHELLABARGER,
J. M. WILSON, and
ALFRED G. SAFFORD,
For Appellant.

APPENDIX.

ENGLISH RAILWAY TRAFFIC ACTS.

ACT OF 1845.

SEC. XC. "And, whereas, it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties;" it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained, from time to time, to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; *Provided, That all such tolls be at all times charged equally to all persons, and for the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods, or carriages of the same description and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls, shall be made, either directly or indirectly, in favor of or against any particular company, or person, traveling upon or using the railway.*

SEC. 2. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for receiving and forwarding and delivering all traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, *and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever;* and every railway company and canal company, and railway and canal company, having or working railways or canals or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be afforded to the public desirous of using such railways or canals, or railways and canals, as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890. No. ~~1438~~ 889

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

Brief for the Baltimore and Ohio Railroad Company, Appellee.

JOHN K. COWEN,
HUGH L. BOND, JR.,
Counsel for Appellee.

THE
INTERSTATE COMMERCE
COMMISSION,
APPELLANT,
vs.
THE BALTIMORE & OHIO
RAILROAD COMPANY.

IN THE

Supreme Court

OF THE

UNITED STATES.

October Term, 1890.

No. 1438.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Brief for the Baltimore & Ohio Railroad Company.

STATEMENT OF THE CASE.

This appeal is taken from the decree of the Circuit Court, dismissing the bill.

The bill was filed to enforce the order of the Interstate Commerce Commission, found on pages 13 and 14 of the Record. That order (1,) requires the printing and posting of schedules showing the rates made for round-trip passenger excursion tickets, and (2,) further orders "that the defendant, the Baltimore and Ohio Railroad Company, do forthwith wholly and immediately cease and desist from charging rates for the transportation over its lines of a number of persons traveling together in one party, which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points." (Record, page 14.)

The answer avers the defendant's compliance with so much of the order as relates to the posting of rates for excursion tickets; and at the hearing below, so much of the complainant's case as related to the posting of such rates was abandoned, "leaving as the only questions to be decided, those relating to the sale of party-rate tickets as conducted by the respondent." (Judge Sage's opinion, Record, page 116.)

The Court below held that the order of the Commission above quoted was "not lawful and should not be enforced." The whole question turns on the meaning and effect of the "Act to Regulate Commerce," and especially of the first, second, third and twenty-second sections of that Act.

Provisions of the Act.

SECTION 1. "The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment" between points not within the same state * * * "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be *reasonable* and *just*; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

SECTION 2. "If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or per-

sons for doing for him or them a *like and contemporaneous service* in the transportation of a like kind of traffic, *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of *unjust discrimination*, which is hereby prohibited and declared to be unlawful."

SECTION 3. "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any *undue or unreasonable preference or advantage* to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person," &c., &c., "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

SECTION 22 (as amended). "Nothing in this act shall prevent (originally "shall apply to") the carriage, storage or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or *the issuance of mileage, excursion or commutation passenger tickets;* nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said houses; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at com-

mon law or by statute, but the provisions of this act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this act."

The Issue of Law.

The conclusions of the Court below, in regard to the meaning and effect of the provisions above quoted, are thus stated by Judge Jackson:

"Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits." (Record, page 135; page 25—*Opinion of Judge Jackson.*)

The Interstate Commerce Commission give a widely different interpretation to the Act. "By the party-rate system the carrier says to all persons in substance: If you want one ticket for the transportation of ten or more persons on the same train, to the same destination, you can have it at a specified reduced rate below the regular rate. Is this an unjust discrimination or the giving of undue or unreasonable preference or advantage to the purchaser of such a ticket (within the meaning of the provisions of the second and third sections of the Act,) as against the persons, from one to nine, inclusive, who have to pay the higher regular rates for precisely the same transportation and service? The answer may be aided somewhat by another question: Why may a party of ten

or more persons have individually a lower rate than a party of nine or less, from a common carrier which is bound to treat all patrons equally who have the same amount and quality of service? The design of the Act to regulate commerce was to put each individual, in the matter of transportation, on exact equality with only such exceptions as the Act itself specified. It was not a new idea in law, for it had always been recognized as a sound, legal proposition though violated in practice, that a common carrier must treat all persons alike under similar circumstances and conditions. It is difficult to see how this individual equality is preserved when in a car-load, say of nineteen persons, all starting from the same point, and having the same destination, ten of them pay two cents per mile each, and the other nine three cents."

Opinion of the Commission, Record, page 11.

As interpreted by the Commission, the Act to Regulate Commerce by its second and third sections requires that all passengers riding in the same car from the same starting point to the same destination, shall pay the same fare; and the collection from one such passenger of a fare higher than that collected from another, constitutes "unjust discrimination," and subjects the first passenger to an "undue and unreasonable prejudice and disadvantage." The carrier is no longer free to consider the increase of its business, no longer free to classify its passenger traffic to that end, or to fix its rates so as to stimulate travel and yield the greatest possible revenue, restricted only by the common law requirements that its rates be reasonable to all, and that it make no distinction between persons to the hurt of any one. In the Commission's view, all facts and circumstances are irrelevant, save those embraced in the statement that the two passengers whose fares are compared, ride in the same car from the same starting point to the same destination. In the present case the conceded facts are that the single passenger paying three cents per mile is charged a just

and reasonable rate; that the party of ten holding one ticket for the ten, and paying two cents per mile each, are charged the lower rate, because the traveling parties, to meet whose needs this party-ticket is sold, cannot travel if the higher rate is charged, their business having grown up under the lower rate; that the revenue derived by the appellee from the carriage of traveling parties on these party-tickets amounts to many thousands of dollars per annum; that by withdrawing from sale these party-tickets at the rate of two cents per mile per person, the appellee would suffer serious net loss in revenue through decrease of travel, while the supposed single passenger would certainly derive no benefit from the withdrawal of the party-tickets.

The Commission holds that the Act to Regulate Commerce prohibits a railroad company from carrying traveling parties and getting the revenue to be had therefrom, if at the same time the company carries the single passenger for what is admitted to be no more than a just and reasonable charge.

ARGUMENT.

The Act to Regulate Commerce enacts certain rules to govern all common carriers engaged in the transportation of passengers and property by railroad or by rail and water between points not in the same State, in the conduct of their business in such transportation, the term "transportation" being defined to include all instrumentalities of shipment or carriage.

To understand the meaning and effect of the Act, we must know something of the business which it seeks to regulate, and must know the prior law applicable thereto.

The Law governing the Business of Railroad Carriers prior to the Act, and the Principles of Passenger Rates.

The Act itself recognizes that the railroad transportation of the country is conducted by common carriers that

own or operate the railroads over which the carriage is made. In fact, the Act prescribes rules to govern only those carriers which do own or operate railroads; and the Commission have, for that reason, declined to assume jurisdiction over express companies.

The Act contains no definition of the term "common-carrier," and for the meaning of that term we must refer to the general law of the States. For the purposes of this discussion we may treat the Act as applying only to railroad companies.

The railroad companies of this country have with a few exceptions been incorporated by the States. They have been vested with the powers necessary to build and maintain a railroad and with the powers necessary to transport for hire passengers and property over the railroad. They have at the same time been charged with the duties correlative to their powers respectively. Such a company is the builder of a public highway, and is at the same time alone entitled to run vehicles thereon. The right of every one to use the public highway becomes of necessity the right of every one to use the vehicles of the company. The right is conditioned upon the payment of hire. The maximum amount of the hire is usually fixed in the grant of powers to the company. Where no maximum is fixed or rate prescribed the amount of the hire will be such as the company may fix, subject only to the limitations which the common or general law attaches to such a carrier for hire. Those limitations are two, (1) that the charges shall be reasonable, and (2) that the carrier serve all impartially. The second limitation attaches to all railroad carriers.

The extent of the State's power to regulate the charges to be collected by a railroad company is now decided. "In Stone vs. Farmers' Loan and Trust Co., 116 U. S. 307, 325, the whole subject is fully considered, the authorities are cited and the conclusion is arrived at, that the right of a

State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its Legislature unless by words of positive grant or words equivalent in law; and that a statute which grants to a railroad company the right 'from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation,' does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But after reaching this conclusion, the Court said (page 331:) 'From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.'" Chicago, &c., Railway Co. vs. Minnesota, 134 U. S., 418, 455–6.

The decision quoted holds that "the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus in substance and effect of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are per-

mitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws." Id. page 458.

Such in brief is the general law governing the amount of the charges of railroad companies as common carriers within the limits of a single State.

The business done by them in transporting persons and property from State to State, or beyond the limits of a single State forms a part of that commerce between the States of which the regulation is given to Congress exclusively, by the Constitution of the United States. "Such companies are instruments of commerce, and their business is commerce itself."

The power of the State to exercise governmental control over the instrument so as to affect the use of the instrument for interstate commerce is terminable at the will of Congress. Even in the absence of action by Congress, the State could not control the instrument so as to affect the business, in matters admitting and requiring uniformity of regulation for the whole country. In matters admitting of local regulation, the State retains the power to control until Congress shall have acted. Between local matters admitting of State regulation and national matters requiring uniform regulation such as Congress alone can provide, the line of distinction has been drawn by this Court more by the character and effect of the regulation in question in each case than by any classification of such regulations.

While the power of the State does not extend to control or affect directly the movement of interstate transportation or the charges therefor, yet the obligations and limitations imposed by the general State law on the railroad company as a common carrier, attach as well to its interstate business as to that wholly within one State.

There has been some conflict in the decisions of the State Courts of last resort, as to whether the general law

requires a common carrier to serve all patrons impartially. With three exceptions, the State Courts before which the question has come for decision, have held that as to railroad companies at any rate, the general law forbids unjust discrimination. Among the Courts so holding, are those of Maine, New Hampshire, New Jersey, Pennsylvania, Ohio, Illinois, Tennessee and Texas.

N. E. Express Co. vs. Maine Central R. R. Co., 57 Me. 188.

McDuffee vs. Portland, &c., R. R. Co., 52 N. H. 430.

Messenger vs. Penna. R. R. Co., 7 Vroom, 407.

Herst vs. Northern, &c., R. R. Co., 74 Pa. St. 181.

Scofield vs. R. R. Co., 43 Ohio St., 571.

Vincent vs. C. & A. R. R. Co., 49 Ill. 33.

Rogan vs. Aiken, 9 Lea, 609.

The Courts of Massachusetts, South Carolina and Florida confined the railroad carrier's duty to the carrying for a reasonable rate without regard to impartiality between shippers.

Fitchburg R. R. Co. vs. Gage, 12 Gray, 393.

Ex parte Benson, 18 S. C. 365.

Johnson vs. Pensacola, &c., R. Co., 16 Fla. 623.

In Massachusetts and South Carolina, general laws were enacted requiring impartiality, and bringing the law of those States in accord with that of the majority.

The Circuit Courts of the United States have, we believe, without exception, held that a railroad carrier can make no unreasonable or unjust discriminations.

Hays vs. Penna. R. R. Co., 12 Fed. Rep. 309.

Texas Exp. Co. vs. Tex. & Pac. Ry. Co., 6 Fed. Rep. 426.

Southern Exp. Co. vs. Memphis &c., R. R. Co., 8 Fed. Rep. 799.

Southern Exp. Co. vs. St. L., &c., Rwy. Co., 10 Fed. Rep. 210, 869.

The prohibition of unjust discrimination is found not only in the general law as decided by the Courts, but also in the State Constitutions and Legislative Acts, as will appear by the following citations from Mr. Stimson's Digest.

In eight States the Constitutions provide that the Legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic. Ill. C., 11, 15; Neb. C., 11, 7; W. Va. C., 11, 9; Mo. C., 12, 14; Ark. C., 17, 10; Tex. C., 10, 2; Ga. C., 4, 21; Ala. C., 14, 22.

The Constitutions of two States provide that no discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company, between places or persons, or in the facilities for the transportation of the same classes of freight or passengers. Pa. C., 17, 3; Cal. C., 12, 21. Substantially the same are the laws of Mass., 73, 7; R. I., 139, 1; S. C., 1335.

It may safely be asserted, therefore, that prior to the passage of the Interstate Commerce Act, the general law of the States required that railroad companies should not make unjust discriminations.

The state of the business and the principles on which it was conducted prior to the passage of the Act to regulate commerce, so far as passenger traffic is concerned, are thus stated in the answer, (Record, pages 22 and 23): "That for many years prior to the passage of the said Act to regulate commerce, all the railroad carriers in the United States had habitually made a rate of charge for passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charge between the same points, and such lower rates were universally made at the date of the passage of said act. To carry on this universal practice many forms of tickets were employed to enable different classes

of passengers to enjoy these lower rates, and so stimulate travel. To meet the needs of the commercial traveler the thousand-mile ticket was used; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were used, *e. g.*, monthly or quarterly tickets, (good for any number of trips within the specified time,) and ten, twenty-five or fifty-trip tickets (good for the specified number of trips by one person, or for one trip by the specified number of persons); to accommodate parties of ten or more, a single ticket one way or round-trip for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists traveling in numbers too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were issued also between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such charge was reasonable and just in the interests both of the carrier and of the public. Long experience has proved the soundness of the principle. Under its application grew up the business of commercial travelers, the enormous suburban business, the constant travel between large cities and the excursion business. Under its application has grown up also the business of traveling companies or parties, which has reached an aggregate of many hundreds of thousands of dollars per annum, and which depends for its existence upon a continuance of the transportation rates under which it has grown up."

The truth of these averments is unquestioned. The witnesses examined by both parties agree as to these facts. As throwing some additional light on the business principles that have governed the making of rates for passenger traffic, we quote from the testimony of Mr. James L. Taylor, (Record, page 112):

"Q. What, if any, is the distinction between the principle on which from the point of view of the carrier, you

make reduced rates for excursions and suburban travel, and that on which you make reduced rates for parties of ten or more, traveling together?

A. There is, to a certain extent, a great similarity in the principles that govern the concessions in the several instances. It may be said that in the South particularly our trains have to run between fixed points anyhow, and that there are certain charges and expenses in connection with them that are very little affected by the volume of traffic. Therefore, the more we can increase the traffic of the several characters, the more we believe we increase our profit in the running of those trains. I suppose that that may be said to be a general principle. We desire to increase the traffic over and above what may be said to be fixed or constant traffic, which we believe we would get any way. We think that what we may get in the shape of this additional traffic may be due very largely to the encouragement which we can afford to give it by special rates, etc.

Q. I understand then that the principle is that wherever concessions would increase the volume of traffic to an extent more than sufficient to compensate the railroad company for the reduction per ticket or per ride, the practice is and has been, to make that reduction.

A. That has been done within certain limits. On every road there is a class of passenger traffic that may be, for this purpose, designated as local traffic, which is not to the same degree affected by the concessions that are made in the rates. But other classes of passenger traffic respond directly to the influence of rates. For instance, the suburban traffic in and out of Washington upon an occasion when we reduced the rates to points on the Washington and Ohio and Virginia Midland divisions responded almost immediately to the reduction in rates by an increased volume of traffic. That is a notable instance in point that fully bore us out in our opinion as to the wisdom of mak-

ing the concession in these commutation rates as we call them. I do not believe that the response would be in anything like the same degree if we reduced our local rates generally all over the road, because the purely local traffic, while it would undoubtedly be increased to some extent in its volume, would not, in our opinion, based upon our past and present experience, respond as profitably to a reduction as the commutation rates, as we call them, because the volume is not so directly affected. Briefly, I may say, that the business of a general passenger agent is to study the various descriptions of traffic, and base his concessions largely upon his judgment and observation and experience."

As interpreted by the Commission, the Act to Regulate Commerce, in its 2d and 3d sections, prohibits, as unjust discrimination, any application of the general principle explained by Mr. Taylor and admitted to be the principle that has hitherto governed the passenger traffic of the country, State and interstate; yet, they say, the Act by its 22d section does create an exception not in favor of the principle, but in favor of the particular forms of ticket therein specified, which exception includes only such forms of ticket as were then known in the ticket offices of the railroad companies by the names "excursion," "mileage" or "commutation."

The Commission state that their rule of equality by which all passengers riding in the same car from the same starting point to the same destination must each pay the same fare, is no new idea in law, but has always been recognized as a sound proposition of law. If this statement be true, then the issuance of excursion, mileage and commutation passenger tickets has been legalized for the first time by the Act to Regulate Commerce. That Act applies only to interstate commerce. Therefore, every such ticket issued between points within the same State is to-day illegal. When we find that every railroad company issues such tickets; that in no State is there a reported

case, in State or Federal Court, wherein the legality of such tickets has even been questioned; that there is no such case in England—when we find this universal practice acquiesced in universally by the people and the Courts, we cannot but believe that the Commission are mistaken. What is common law? By whom has this "idea in law" been recognized as a sound legal proposition?

This brings us to a more critical examination of the Act itself.

Analysis of the Act.

In the first place, in what spirit should this Court enter upon the interpretation of this Act? In this first enactment by Congress in the exercise of its great power to prescribe rules for that business with which all other business interests are so closely connected, should this Court seek for rules that will revolutionize the conduct of the business? Is it not to be inferred that Congress felt the difficulty and delicacy of the task before it, and intended to work as little disturbance as possible?

In the light of that inference, must not this Court interpret the provisions of the Act so as to conserve the order of things existing at its passage, except where there appears a clearly expressed intention to establish a new principle? The same rule of interpretation would confine to its obvious application even a new principle clearly laid down.

Such an interpretation will make of the 1st, 2d and 3d sections of the Act, not a body of experimental rules framed without regard to the actual principles of the business, but rules adopted from the law under which the business had grown up, and stated in such general terms as to permit their adaptation to the practical conditions of the business.

The first section adopts as the Federal law of interstate commerce, the rule of the general State law, that charges must be "reasonable and just."

The second section prohibits "unjust discrimination," and is directed particularly against unjust discrimination in charges, between purchasers of transportation. Such unjust discrimination was prohibited also by the general State law.

The third section also prohibits unjust discrimination, but it uses the language of the second section of the English Railway and Canal Traffic Act of 1854. This language is more specific than that of most of our State enactments, and constitutes a definition of what our general State law has designated by the general term, "unjust discrimination." The third section includes in its prohibition all species of unjust discrimination, as well those prohibited by the second section, as all others.

A. T. & S. R. R. Co. vs. D. & N. O. R. R. Co., 110 U. S. 684–5.

Congress is here assuming for the first time the control of the business of interstate transportation. With its action ends the reign of State law over this business. There is reason enough, then, for taking the greatest care, even at the expense of repetition, to embrace in this statute all the rules of the general State law governing the business. The undertaking is the ever difficult task of codifying the common law.

While the necessary care is taken to include in this codification all the principles of the common law, yet the generality of the terms employed shows, as it seems to us, equal care not to enact any hard and fast rule, but to give the codified rules the same flexible meaning that they had in the common law. The terms used are "reasonable," "just," "unjust," "undue" and "unreasonable," terms that refer for their meanings to that ultimate reason and sense of justice which the common law supposes to reside in the mind of man, and especially in the mind of a judge. These words are capable of general

definition only in terms of mental impressions. No practical specific definition can be given them except as applied to particular facts.

As Mr. Stroud says in his Judicial Dictionary, "It would be unreasonable to expect an exact definition of the word 'reasonable.'"

The effect of using these terms in the statement of a rule of conduct is necessarily to make the application of the rule dependent on the facts of each case as it arises.

But say the Commission, we find in the second and third sections of the Act a definition of the words "unjust" and "undue," and by that definition *every* difference in charges made between passengers riding in the same car from the same starting point to the same destination is an "*unjust* discrimination" and an "*undue* preference."

We answer that not only is the Commission's interpretation inconsistent with the general character of the Act and contrary to the conservative interpretation that should be given it, but the Commission's interpretation creates inconsistencies between the provisions of the several sections of the Act itself.

The first section requires that all charges be reasonable and just. All the railroad companies of the country have, by the practice of years, recognized the justice and reasonableness of a lower charge per ride to the passenger buying a time ticket, a ticket for ten trips or a mileage ticket, and to a passenger riding with nine or more others on a single ticket. This lower charge has everywhere been acquiesced in as reasonable and just by everybody, and great business interests have come to depend on the continuance of the practice. To interpret the second section, as requiring the company to charge these passengers the full single-trip fare, is to interpret the second section as requiring a violation of the prohibition in the first section. Surely, the word "unjust" in the second section must mean the opposite of the word "just" in the first section, and cannot mean the same thing.

In Concord and Portsmouth Railroad Company vs. Forsaith, 59 N. H. 122, a question analogous to this arose on

the New Hampshire statute which provided that "the rates shall be the same for all persons, and for like descriptions of freight between the same points," and that "all persons shall have reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property." The Court said: "By enacting that the rates shall be the same for all persons, and for like descriptions of freight between the same points, the Legislature could not have intended an equality that is absolute, fixed and unvarying, if such equality is unreasonable. To find the true construction of the statute, and the correct meaning of the terms used, the whole section must be considered together. The first clause requiring that the rates shall be the same is illustrated and explained by the second clause, requiring that all persons shall have reasonable and equal terms." "The terms of the statute must receive the interpretation which long-established usage and the custom of the commercial world have given them." "Unreasonable equality is inequality."

The Commission's interpretation puts Congress in the position of forbidding as "unjust," all acts in pursuance of an existing principle of the business; and then by the 22d section, authorizing the doing of those very acts when done in the interest of certain classes of passengers who can use tickets of particular forms.

But the language of the second section neither requires nor bears out the interpretation of the Commission.

The section seeks to define in most guarded and general terms, that species of unjust discrimination which consists in discrimination in charges between purchasers of transportation. To define unjust discrimination in charges it is first necessary to eliminate all differences between the charges compared, that may affect the justness of the discrimination. Accordingly, section 2 provides that the services for which the charges are made, respectively, shall be "like and contemporaneous services in the transportation of a like kind of traffic." These words embrace all the physical features of the respective services. Cer-

tainly they require, in the case of services rendered in the transportation of passengers, that the passengers between whom comparison is had, shall ride contemporaneously from the same starting point to the same destination, in cars of the same class. The word service in such a connection has a double meaning. It means the acts done by the carrier and the benefit derived from those acts by the person for whom they are done. This Court held, in the case of Union Pacific Ry. Co. vs. United States, 117 U. S. 355, that the service rendered by a railway company in transporting a local passenger from one point on its line to another, is not identical with the service rendered in transporting a through passenger over the same rails.

The present section 2 does not deal with relative rates per mile of transportation, but deals with gross charges for whole services; and in the clause we quote is describing the services for which the respective charges must be neither greater or less. Therefore, we say that the phrase "like and contemporaneous service in the transportation of a like kind of traffic" in its narrowest meaning, covers all the physical features of the transportation, and eliminates all differences in those features which could affect the justice of the discrimination. A comparison of the present section 2, with the first section of the Reagan Bill, and with the Oregon Act cited in *ex parte* Koehler, 23 Fed. Rep. 530, will show this very phrase in the same connection employed in both the latter without other modifying phrases, and yet in a meaning that must embrace both the aspects above stated.

But Section 2 of this Act contains a phrase that requires further similarity between the charges compared. The provision is, "That if any common carrier * * shall, directly or indirectly, * * * charge, demand, collect or receive from any person * * * a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this Act, than it *charges, demands, collects or receives* from any other person or persons for doing for him or them a like and contemporaneous service

in the transportation of a like kind of traffic, *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination," &c. To the phrase, "under substantially similar circumstances and conditions," the Commission give no effect whatever. Their reading of the section attaches the phrase to the word "transportation" or to the word "doing," and makes the phrase refer to physical circumstances and conditions of the transportation service. Since all such circumstances and conditions are exhausted by the words "like and contemporaneous service," the Commission's reading reduces the additional phrase to mere surplusage.

As we read the section, the phrase "under substantially similar circumstances and conditions," qualifies the verbs "charges," "demands," "collects" and "receives." The common carrier is a seller of transportation services. The section enacts that if such a seller charges one person more or less than it charges another person *for the same thing*, "under substantially similar circumstances and conditions," then the seller shall be deemed guilty of unjust discrimination. The object of the section clearly is not to prohibit all differences in charges for the same thing, but to prohibit *unjust* differences. Therefore, in seeking to decide whether a particular difference is prohibited all "circumstances and conditions" must be considered which affect the justice or injustice of the respective charges compared. It would be hazardous to seek to lay down a general rule that would distinguish those circumstances and conditions which do affect the question from those which do not affect it.

Certainly those circumstances and conditions which under the general State law have always been deemed sufficient to justify a difference in charges must still be considered to justify it under this Act.

It is a concession in the present case that each of the charges compared is reasonable in itself, and that the difference between them is justified by business reasons

which prior to the passage of this Act have always been deemed sufficient to justify such a difference, under the rule of the general State law against unjust discrimination.

There is one essential quality, lacking which no discrimination has ever been held unjust, a quality implied in the in the term "unjust." That quality is hurtfulness. An Act that can hurt no one can never be called unjust, if the term "unjust" is to have a meaning. Every hurtful discrimination is not unjust, but no harmless discrimination can be unjust.

In Hays vs. Penna. R. R. Co., 12 Fed. Rep. 309, Judge Baxter said: "The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is in a qualified sense a public highway. Hence, everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the benefit of the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for the present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. *It may, however, be said that it is only when the discrimination enures to the undue advantage of one man in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in.*"

The same test has been consistently applied by the English Courts in cases arising under the second section of the Railway and Canal Traffic Act of 1854, which, as we have already stated, is but the prohibition in more specific language of what the State law has included under the general term "unjust discrimination."

Lord Curriehill's opinion in Hozier vs. Caledonian Railway Co., 1 Railway and Canal Case, 27, is an illustration. "The only case stated in the petition is that passengers passing from Glasgow to Edinburgh or from Edinburgh to Glasgow are carried at a cheaper rate than passengers from Motherwell," (an intermediate station where the petitioner lived) "to either of these places. Now, that is an advantage no doubt to those passengers traveling between Edinburgh and Glasgow. But is it an unfair advantage over other passengers traveling between intermediate stations? The complainer must satisfy us that there is something unfair and unreasonable in what he complains of in order to warrant any interference. Now, I have read the statement in the petition, and have listened to the argument in support of it to find what is unreasonable in giving that advantage to through passengers. *What disadvantage do Motherwell passengers suffer by this?* I think that no answer was given to this, except that there was none. Upon the whole, therefore, I am for refusing this petition." 1 Rwy. and Canal Cas. 31.

In the *Law Times* report, Lord Curriehill, adds: "This petitioner's complaint may be likened to that of the labourer, who having worked all day, complained that others who had worked much less received a penny like himself."

That harm to some one is an essential element in the idea of injustice, all writers on philosophy agree. Herbert Spencer, in the volume of his Synthetic Philosophy, entitled Justice, Ch. VI, § 27, states the "Formula of Justice' as follows: "The formula has to unite a positive element with a negative element. It must be positive in so far as it asserts for each that, since he is to receive and suffer the good and evil results of his actions he must be allowed to act, and it must be negative in so far as, by asserting this of every one, it implies that each can be allowed to act only under the restraint imposed by the presence of others having like claims to act. Evidently the positive element is that which expresses a pre-requisite to life in general, and the negative element is that which qualifies

this pre-requisite in the way required, when, instead of one life carried on alone, there are many lives carried on together. Hence that which we have to express in a precise way, is the liberty of each, limited only by the like liberties of all. This we do by saying:—Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." In appendix A of the same volume will be found a statement by Kant of the "Universal Principle of Right" which is substantially identical with Mr. Spencer's, "Formula of Justice."

John Stuart Mill, in his "Utilitarianism," chapter V, "On the Connection between Justice and Utility," analyzes the idea of justice in order to determine "whether the feeling itself of justice or injustice is *sui generis*, like our sensations of color and taste, or a derivative feeling, formed by a combination of others." "To throw light upon this question, it is necessary to attempt to ascertain what is the distinguishing character of justice or of injustice; what is the quality, or whether there is any quality attributed in common to all modes of conduct designated as unjust, (for justice, like many other moral attributes, is best defined by its opposite,) and distinguishing them from such modes of conduct as are disapproved, but without having that particular epithet of disapprobation applied to them. If, in everything, which men are accustomed to characterize as just or unjust, some one common attribute or collection of attributes, is always present, we may judge whether this particular attribute or combination of attributes would be capable of gathering round it a sentiment of that peculiar character and intensity by virtue of the general laws of our emotional Constitution."

After passing in review various modes of action "which are classed by universal or widely spread opinions, as just or unjust," and after reviewing the history of the word "just," as indicated by its etymology, Mr. Mill finds that in every case the supposition of injustice implies two things—"a wrong done, and some assignable person who

is wronged." "Injustice may also be done by treating a person better than others; but the wrong in this case is to his competitors, who are also assignable persons. It seems to me that this feature in the case—a right in some person correlative to the moral obligation—constitutes the specific difference between justice, and generosity or beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as a moral right."

"To recapitulate: the idea of justice supposes two things —a rule of conduct and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good; the other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule. There is involved in addition, the conception of some definite person who suffers by the infringement; whose rights (to use the expression appropriated to the case,) are violated by it." "I have, throughout, treated the idea of a *right* residing in the injured person, and violated by the injury, not as a separate element in the composition of the idea and sentiment, but as one of the forms in which the other two elements clothe themselves. These elements are *a hurt to some assignable person or persons on the one hand*, and a demand for punishment on the other."

The writers quoted agree with the common law in assuming the existence in the human mind of a "sense of justice." The results of their respective analyses of that "sense" agree in finding as an essential element in all "injustice," what the courts have uniformly held must be an element, to wit: Harm to some assignable person.

When, therefore, the Commission say that Congress has by the second section of this Act enacted a definition of "*unjust* discrimination," and has omitted from that definition altogether the element of harm to some assignable

person,—the Commission's statement is a contradiction in terms. An act to prohibit all discriminations just or unjust may or may not be within the constitutional power of Congress; but an Act to prohibit *unjust* discrimination *must* draw the dividing line between the discriminations which harm some assignable person and those which do not harm any assignable person.

The Commission's interpretation of the second section, therefore, not only gives no meaning to the phrase "under substantially similar circumstances and conditions," but also disregards the word "unjust" altogether. Their interpretation assumes that Congress has applied the epithet "unjust" not in the meaning which that word has in the English language, but in some meaning which Congress enacted into it for the occasion. In short, to adopt the interpretation of the Commission is to reduce the language of the second section to paradoxical nonsense.

That the intention of the Act to Regulate Commerce is to prohibit only such discrimination as is harmful, only such as Judge Baxter denounced as unlawful, is shown by the provisions of the 22d section of the Act itself. That section specifies a number of transportation services of the most diverse descriptions, and provides that nothing in the Act shall be constructed to prevent the railroad companies from making special arrangements or reduced rates for those services, or in some cases from doing the service for nothing.

Diverse in kind as are the services specified there is one characteristic common to them all, they are services such that no one can be harmed by the carrier's making such arrangements as it chooses about them. Ministers of religion are not in the money-getting competition of the world, and so no competitor can suffer by a reduced rate given them; and so of the other purchasers of transportation mentioned.

Evidently the provisions of this section were inserted out of abundance of caution not to create exceptions to the rules of the preceding sections, but to insure an interpretation of those sections in accordance with the intention of Congress. Congress did not intend to forbid the discriminations mentioned in section 22. Why? Because none of those discriminations could be harmful. No characteristic but harmlessness is common to them all. The list is not exhaustive. These are the cases to which the attention of Congress has been called, and cases as to which Congress has been willing to say in advance that the discrimination is harmless. If the railroad companies make other discriminations they must take the risk of the courts' decisions as to whether the discriminations are harmless or not.

The 22nd section provides that "nothing in this Act shall prevent," among other things, "the issuance of mileage, excursion or commutation passenger tickets." The plaintiff's testimony in this case is taken to prove that the so-called "party ticket" was not, in railroad parlance, called or known as a "mileage," "excursion" or "commutation" ticket at the date of the Act's passage. The theory of the Commission is that this provision of the 22nd section creates an exception from the rules of the 2nd and 3d sections, in favor of certain *forms of ticket*, and that *no form of ticket* not then in use, and known as a mileage, excursion or commutation ticket, in the vernacular of railroad ticket offices, can be included in the exception. On the other hand the defendant's theory is that this provision of the 22nd section recognizes the business principle in pursuance of which the *forms of ticket* named have been issued, and that it amounts to a legislative construction of the 2nd and 3rd sections as not forbidding the application of that principle in making passenger rates.

All the witnesses agree that the same business principle induces the making of the reduced rate for party tickets that induces the making of reduced rates on tickets ad-

mitted to be commutation tickets. We think the testimony of the plaintiff's own witnesses shows that no meaning can be given the words "commutation passenger tickets," which does not include all tickets issued on the same principle.

It will save this Court labor if we quote briefly the attempts of plaintiff's witnesses to distinguish what are commutation passenger tickets.

Mr. Elias A. Ford, Gen'l Passenger Agent of the P. C. & St. L. Ry. Co., whose testimony is found from pages 27 to 37 of the Record, being asked to state the distinguishing features of such tickets, says (page 28), "Commutation tickets in the ordinary acceptance of the term, as my experience has shown, are a special and distinct form of ticket of themselves or by themselves, used by commuters who live near large cities, and sold at very greatly reduced rates usually; and the tickets are printed so they are good for passage between the stations intended to be covered, in either direction. And in our custom and practice, and as they have been regarded by me and the men under me, in my experience they constitute an entirely different and distinct class of tickets from the so-called 'one way party-rate tickets.'"

After admitting, on page 33, that package tickets and strip tickets in favor of bearer, were sold by the roads which he represented, he is again asked, on page 36, to give his definition of commutation ticket, and answers: "Well, my understanding of a commutation ticket was a ticket that was sold at a reduced rate for the transportation of the suburban resident, or the members of his family, between cities and a suburban point near a large city."

"Q. In that category you include 50-ride tickets, 25-ride tickets, and 10-ride tickets, when sold in that territory?

Ans. Yes, sir.

Being then asked whether a 50-ride ticket sold between Chicago and Milwaukee, or a similar ticket sold between New York and Philadelphia, would be a commutation ticket, he admitted that such a fifty-ride ticket would be a commutation ticket within his definition, if good in either direction.

"Q. Then it is not the territory in which a ticket is used but the travel on a ticket that brings it within your idea of a commutation ticket?

A. No sir, that is not it, commutation ticket as I have described it, don't matter what point it may be, is as I have already stated.

Q. State it over again, please?

A. A commutation ticket is good for one or more persons and good in either direction, and purchased at reduced rates."

Mr. Leslie P. Farmer, General Passenger Agent of the N. Y., L. E. & W. R. R. Co., whose testimony is found between pages 83 and 88 of the Record, testified (page 84), "Party rate tickets are a distinct form of transportation not connected in any way with commutation tickets; the former being for one trip between certain specified points, and the latter for daily travel."

On cross-examination he testified that ten, twenty-five and fifty-trip tickets, of various sorts, were generally sold before the passage of the Act, and that a fifty-trip ticket good for bearer without regard to the number of persons traveling on it, was sold between Philadelphia and New York; and being asked whether such trip tickets came within his understanding of the meaning of the term "commutation ticket," prior to 1887, he answered, "No sir, I shouldn't say that they were generally classed as commutation." (Page 85)

X-Q. 21. Will you not describe as specifically as you can the tickets in use on the roads which you represent, which you consider commutation tickets.

A. I should call a ticket issued for a month, for an individual, a commutation ticket, or one issued for a scholar for a specified period, a commutation ticket; this might also cover tickets issued for more than one month for any period up to and including one year; and on the Pennsylvania Railroad I know that there was a ticket called a 'family ticket' which I should class as commutation; that was a ticket good for a specified number of rides within a certain period, for any member of a family.

X-Q. 26. Then so far as recognized classes of reduced rate tickets are concerned, at the time of the passage of the Interstate Commerce Law, there were the mileage, the excursion, and what you call commutation tickets; is that your understanding?

A. Yes, sir.

X-Q. 27. You have testified, however, that there were in use tickets good for ten, twenty-five, fifty and other numbers of trips, but your understanding is that they do not fall within any of the recognized classes, but would be classified as unclassified, prior to the passage of the law?

A. "Yes." (Record, page 86.)

Mr. George H. Daniels, General Passenger Agent of the New York Central and Hudson River Railroad, whose testimony is found on pages 89 to 96 of the Record, after testifying, on cross-examination, that in his experience before the passage of the Act, the railroad companies issued time tickets and ten, twenty-five, fifty and one hundred ride tickets, and that in some instances a ten-ride ticket could be used by ten persons one way; and that a fifty-ride ticket was sold between Milwaukee and Chicago, testified as follows:

X-Q. 22. Which of these tickets that you have described as in use before the passage of the Interstate Commerce Law would you include in the term Commutation tickets, and what other tickets, if any, would you include under that class?

A. Well, I would include as a commutation ticket any ticket that was sold to a person at a reduced rate to be used within a certain time and to be good between certain stations for a given number of trips.

X-Q. 23. Then you have in mind the time tickets, monthly or other, and the trip tickets which you have mentioned?

A. Yes, sir.

X-Q. 24. And what else?

A. I would include in it a yearly ticket, quarterly ticket, monthly ticket, and ten, twenty-five, fifty and one hundred rides, either of those." (Page 91.)

The witness then produced a strip ticket good to bearer, which he afterwards testified had taken the place of package tickets, substantially like street car tickets, formerly in use on the Hudson River Railroad.

"X-Q. 28. Would you classify that strip ticket as a commutation ticket?

A. Yes, I think I would.

X-Q. 29. Why?

A. Because it is sold to the same class of persons for the same kind of service as the book form of commutation ticket; it was another form intended mainly for the convenience of families of commuters.

X-Q. 30. I understand you then as confining the term commutation ticket to tickets used or for the use of suburban travel?

A. Very largely so, yes sir.

X-Q. 32. Suppose a similar ticket (to the strip ticket) was issued and used between Philadelphia and New York, how would you classify that?

A. Well, I should class it as a commutation ticket.

X-Q. 33. That is, a commutation ticket in your understanding of the term is one issued where there is frequent travel?

A. Yes, sir.

X-Q. 34. It is not the form of ticket but the character of the travel that would determine the classification in your mind?

A. Yes, the form of the ticket and the character of the travel should be taken into consideration, in my mind, in stating what a commutation ticket was.

X-Q. 35. You have stated the particulars in the character of the travel, what particulars in the form of the ticket?

A. Well, I do not mean exactly in the form of the ticket but in the character of the ticket; for instance, I would not call a card ticket that could be torn in two in the middle and one part used for the going passage and the other for the return passage, a commutation ticket; I would call that an excursion ticket, because it was simply intended for one trip out and back. A commutation ticket as I have always considered it, means that a man undertakes a certain amount of travel in a specified time and between specified points, and if he does that he is given, of course, a reduced rate in consequence of the amount of travel he takes.

X-Q 36. Is it or is it not a fact that the charge is regulated by the frequency of the service and the amount of travel?

A. Yes sir.

X-Q. 37. That would in itself, would it not, show that the amount of travel contracted for was the consideration for the reduced rate?

A. The amount of travel and the time would be the principal considerations, yes sir." (Pages 92-3.)

On re-direct examination, witness testified:

"R-D Q. 63. Was it not one of the characteristics of the commutation ticket that the party was permitted to ride

in either direction within a limit of time and limit of stations?

Yes sir.

R-D-Q. 64. Would you bring any ticket into the class of commutation ticket which did not permit the holder to pass in either direction over the railroad?

A. No sir, I would not."

Mr. George R. Blanchard's definition of commutation ticket will be found on page 97 of the Record, and is as follows: "Strictly speaking, a commutation ticket is one by means of which one and the same person, or the members of one family, can travel between stated points daily or at regular periods during a specified period at reduced rates of fare made public and to be availed of by any one who conforms to their rules of issue. *Per contra* one-way party rates have none of the characteristics of commutation rates, being for irregular travel of unknown numbers of persons at or above a minimum number, between points often outside of *commutation limits* and which points varied with the applications of the parties traveling one way, such as theatrical troups, for illustration, going between New York and Elmira, between which points there were no commutation tickets. One-way party rates also differ from excursion tickets, the latter being to parties both ways instead of one. I should say, therefore, that one-way party rates were and are now considered a distinct class of travel apart from commutation travel."

"X-Q. 20. The distinction then that you make between the present party-rate ticket and the commutation ticket is a distinction between the forms of ticket and between the territories or classes of passengers for whose use they were issued?

A. Not altogether; the commutation traveler, for example, between New York and Passaic might travel regularly twice a day for 365 days in the year, while a theat-

rical ticket might be given to a company that did not pass over the same road once in five years; the commutation ticket was therefore a recognition of the frequency of travel of one party between stated points, so that railway officers knew exactly how to provide for them, run trains, furnish the adequate number of cars, station facilities, etc., for an income to be derived from them which was known beforehand by the railroad company and to the passenger; whereas the theatrical party rate travel was irregular, depending upon the success of the entertainment offered and the public favor it was received with, and the conditions, therefore, were somewhat different, aside from the forms of ticket. They were both, in my judgment, reasonable concessions to the travel of different classes as distinct and apart as the travelers who travel by the limited trains are distinct and apart from second-class passengers, but equally good business considerations favor the issue of the separate forms and fares to each."

Mr. Lucius Tuttle, General Manager of the New York, New Haven and Hartford Railroad Company, whose testimony is found between pages 101 and 106 of the Record, after stating, in answer to question 7, (page 102,) what the practice was on the New England roads, and that the party-rate ticket where used, was not called a commutation ticket; and after stating, in answer to cross-questions 16, 17 and 18, that the New England roads issued a card ticket good for ten rides, which could be used by anybody, and by ten persons at the same time, if they rode together, further testified as follows, (pages 105 and 106):

"X-Q. 35. The distinction that you made then is between a ticket issued at a lower rate in consideration of frequent travel, which you term a commutation ticket, and a ticket issued at a lower rate in consideration of the amount of travel contracted for, which you say you would not term a commutation ticket?

A. I could hardly answer that, yes or no; I should have to give my own reason. My distinction between the term commutation and special rate comes simply from the matter of custom in naming those different tickets for convenience in the ticket office, nothing more, nothing less; we had certain names for certain tickets; a ticket which gave a man, or a family, or a number of persons the right to travel daily between two points at a reduced rate, was known in our office as commutation or season ticket, a ticket which gave a party of persons the privilege of riding specially between two points for a specific purpose, was called a special-rate ticket, or a theatrical-rate ticket, or a party-rate ticket.

X-Q. 36. The commutation or season ticket might practically give the holder the same rights as the party-ticket, for instance, to carry nine other persons besides himself?

A. Yes, sir.

X-Q. 37. But that would not affect the question, in your mind, as to one of custom?

A. No, my point is this, that if a man having a party could take advantage of the commutation ticket, which was regularly on sale, there was nothing to prevent him doing so, but when he came in and made a special arrangement for his party he became a special party and used a special party ticket.

X-Q. 38. The business or commercial consideration moving the railroad company in the instance of all these forms of ticket that you have mentioned, mileage, commutation, special tickets and season tickets, was really substantially the same, was it not?

A. Yes, of course, every railroad made its reduced rate tickets for wholesale business.

X-Q. 39. And the different forms which these trip tickets took were forms given them in order to adapt the evidence

of the right to ride to the needs of the people who wished to ride; is not that so?

A. Yes, that is so; or to the business needs of the company that carried them; there came to be a universal custom throughout the country of giving reduced rates to all sorts of people travelling by wholesale, the man who lived in the suburbs and came to the city for his daily business, used one kind of a reduced rate ticket which was called usually a season ticket; and another man who lived in the suburbs and came to the city occasionally, once a week or twice a week, usually bought a ticket giving a certain number of rides, usable at his pleasure or usable within three months or six months, and that was called generally in my experience a commutation ticket. The mileage ticket covered a certain number of miles anywhere upon the railroad or over specified portions of that railroad, and the conductor detached, when the passenger rode, or the passengers for whom it was used, the number of miles actually used; then there was an arrangement on almost all roads for giving reduced rates for wholesale business—people travelling together, whether theatrical companies, ministers, women conventions or anything else, which were called special rates or party rates. Now the technical definition of what is strictly a commutation ticket, what is strictly a party-rate ticket, what is strictly a special-rate ticket, may be something too fine for me to decide, but I can only speak of the technical terms when these tickets were distinct in our different offices."

Where among these conflicting statements of opinion can the Court find a description of "commutation passenger tickets" that furnishes any practical guide in determining whether a ticket like the so-called party-rate ticket which, the testimony shows, came into general use only after the passage of the Act to Regulate Commerce is a commutation ticket?

The suggested distinguishing characteristics are (1), that the commutation ticket was one for use of suburban

residents only. But when confronted with the fact that the very tickets described were sold for use between large cities, and on some roads, between any two stations, the witnesses abandon the use in a particular territory as a test.

(2). It is suggested that frequent travel at regular intervals is what distinguishes such tickets. But the ten-ride tickets in strip, package or card shape might, at the option of the holder, be used so as to exhaust the ten rides on a single trip by ten persons together.

(3). The only remaining suggestion is that no ticket can be a commutation ticket which is not good in either direction between the points named on it. It is admitted that the ten-ride ticket in all its forms need not be used in both directions, but may be used to transport ten persons in one direction, at the holder's option—precisely the use that is made of the so-called "party-rate ticket." Therefore, the supposed distinction resolves itself into the fact that by the ten-ride ticket, in its card shape for instance, the holder gets the option to use it in both directions instead of being required to use it in one direction only.

The only alternative interpretations possible under the proof are either to hold that the act means to include under the words, "commutation passenger tickets," in the 22d section only tickets of certain forms then in use *and as then used*, (so that any new form of ticket or any old form used to meet a new commercial demand would not fall within those words); or else to hold that those words include any form of ticket then in use or thereafter made, which evidences a contract to carry at a reduced rate, reasonably based upon the business principle of giving a lower rate in consideration of the amount of travel purchased. This is the definition of the expression "commutation tickefs," given by the defendant's witnesses. Wm. B. Shattuc, (Record, pages 38 to 51,) Ernest O. McCormick, (Record, pages 52 to 63) and O. P. McCarty, (Record, pages 63 to 71.)

The Power of Congress over Railroad Companies.

The Act of Congress under discussion must of course be construed with reference to the Constitutional power which Congress exercised in its passage. If it be found that the meanings ought to be given the act by the Interstate Commerce Commission would carry the exercise of power to the extreme verge of its Constitutional limits, then, we say, every presumption is against the correctness of the Commission's interpretation.

The power of Congress is the power "to regulate commerce between the states." Its control of railroad com-companies is derived from its power to regulate a part of their business. As instruments of interstate commerce, and while instruments of such commerce they are subject to its regulations with reference to that commerce. With their other business concerns and their corporate matters, Congress has nothing to do.

Moreover, the power of Congress to regulate commerce is subject to restrictions placed upon all its powers by the provisions of the Fifth Amendment for the protection of private rights. It cannot in the exercise of this power take private property without just compensation or deprive any one of life, liberty or property without due process of law.

The limits to the power of the State fixed by the decision of this Court in the Minnesota cases, 134 U. S., are even more clearly bounds beyond which the power of Congress cannot go. If so, then Congress cannot compel a railroad company to carry for less than a reasonable rate.

In the present case the conceded facts are that there are a large number of organized companies or parties whose business requires them to travel; that these parties can afford to pay two cents a mile per person and no more, and if a higher rate is exacted, they must cease to travel, and

that the defendant carrier is willing to carry them for two cents a mile per person.

It is not alleged or attempted to be proved that the carriage of these parties at the agreed rate will harm any other person. It is asserted, however, that Congress has made their carriage unlawful, if at the same time any single passenger be charged at the rate of three cents a mile. The question is, Can Congress make unlawful the agreement between the carrier and these parties, under the facts stated?

Evidently, the alleged prohibition has the effect on the one hand of preventing the carrier from carrying, and on the other hand of preventing the party wishing to travel from riding. The carrier is deprived of earnings which it could otherwise make; the members of the party are deprived of the opportunity to travel from State to State in the pursuit of their business. We submit that the power of Congress does not extend to abridge thus the property-rights of the carrier, or the liberty of the individual. It is to be remembered that the power of Congress is no greater, because the carrier is a railroad company, and no greater because the carrier is a *common* carrier. As a *common carrier*, it could lawfully make the contract supposed. As a railroad company, it comes under the control of Congress only so far as it is a *carrier* of interstate commerce. The power of Congress over the member of the party is no greater because of the fact that some other person traveling by himself pays three cents a mile, since by the facts conceded there is no relation between them that makes the sum paid by one, concern in any way the other. Therefore, the same and no greater power would be required to enable Congress to forbid the travel of any person from one State to another, except upon the payment of three cents per mile traveled.

The power contended for by the Commission is the power to require that all persons pay the same rate of fare per mile, assuming that the cost of carriage is the

same for all. The theory of the Commission is what we may call the "Taxation and Cost Theory."

Their theory is based, in the first place, on the conception of the total amount paid for transportation on all the railroads of the country, as a great aggregate burden or tax on commerce. Next they conceive the idea of apportioning that aggregate tax among the persons and articles of commerce carried. The basis adopted for the apportionment is the actual cost of each particular transportation service. It follows as a corrollary, that whenever there is no difference in cost, the apportioned amount of taxation must be the same. The order, to enforce which this suit is brought, is an instance of the applica tion of the theory to passenger rates. The Commission have sought to apply it as well to freight rates, in certain opinions where they have styled its application, "the rule that rates must be relatively reasonable."

By "relatively reasonable," they mean not that the rates on commodities competing in the market must be so adjusted as not to subject one or the other to a disadvantage in such competition without reason therefor; but they mean that rates on commodities bearing no competitive relation to each other, must be so adjusted that each may bear only its share of the aggregate taxation for transportation apportioned in accordance with their theory, i. e., in proportion to the respective costs of the transportation services, per ton per mile, or by whatever unit of measure is adopted.

What has already been said under preceding heads of this argument, demonstrates, we think, that the Act to Regulate Commerce does not countenance this theory of the Commission as to the true method of making rates, wholly at variance, as it is, with the actual practical method under which the railroad business of the country has grown to its present magnitude.

As explained in the testimony of Mr. Taylor, already quoted, the matter of cost plays little or no part in the

actual making of passenger rates. In making freight rates an arbitrarily estimated cost may serve to fix the minimum, below which a rate must entail a loss in doing the service; but freight rates are not fixed on the basis of cost of service, for the reason, among others, that no one knows or can ascertain even approximately the cost of any particular service by average or otherwise. The railroad company's business is in this respect exactly similar to a manufacturing business producing joint products. It is impossible to tell how much of the total expenses of the business should be charged against each separate product as its separate cost. In the railroad business the indivisible expenses are so large as to prevent even an approximation, except by the vaguest guess-work.

Independent of the fact that cost is an impracticable basis for rates because of its uncertainty, experience has shown that rates fixed on that basis are not adapted to the commercial needs of the country. On that basis it would be impossible for cheap and heavy articles, such as coal, stone and lumber, to bear the cost of transportation. The necessities of commerce have, therefore, forced the carriers to adopt as the basis of rates the *value* of service. It is by the operation of rates made upon that basis that the commerce of the country has grown to be what it is. For a fuller discussion of the economic questions involved in the foregoing statements, we would refer the Court to the following: "Railroad Transportation" by Prof. A. T. Hadley; "Railway Practice," by E. Porter Alexander; "The Distribution of Products," by Edward Atkinson.

The railroad carrier, then, is simply a seller of transportation, governed by the same commercial conditions and necessities that govern the seller of any commodity; except that the carrier's price is limited by the law of its being to what the service sold is reasonably worth, and that it cannot unjustly discriminate in favor of one purchaser to the damage of another.

The Commission say: "The design of the Act to regulate commerce was to put each individual, in the matter of

transportation, on exact equality, with only such exceptions as the Act itself specified." The context shows the expression "exact equality" to mean equal rates per mile to all *receiving* "the same amount and quality of service."

The constitutioual question presented by the Commission's theory of the Act is this:

Can Congress fix a rule of "exact equality" as the Commission use that expression?

The effect of this theoretical rule of exact equality when applied to passenger traffic has been repeatedly illustrated in this argument. The extent of the power claimed for Congress will be better shown by instancing an application of the theoretical rule to freight traffic. The whole system of freight classification has grown up by reason of and on the basis of the value-of-service method of making rates. A classification based on a method requiring equal-rates-per-mile per amount and quality of service received would necessarily require that the rate now charged on high-class articles and the rate now charged on low-class articles should be much more nearly equal than now, because the difference between those rates is not made up by the difference in the amount and quality of service. Between many articles now classed in the higher and lower classes, respectively, perhaps no difference could be shown in the amount and quality of service rendered in transporting equal bulks or equal quantities over the same rails. Now the present rates are based on the value of the service sold by the carrier. Therefore, the supposed classification in accordance with the Commission's theoretical method would compel the carrier either to carry the present higher classed articles for less than the value of the service, *i. e.*, to sell its services for less than thery are worth, or else to charge the present lower classed freight more than that freight can pay, *i. e.*, to seek to sell its services for more than they are worth, and, therefore, more than they will bring.

Conversely, the effect of this theoretical method of classification on the shipper would be to enable the shipper of

present higher-classed articles to obtain his transportation service for less than it would sell for, and to prevent the shipper of present lower-classed articles from buying his transportation at all. The question, then, recurs is an exercise of power which involves the results described, within the constitutional powers of Congress? That question resolves itself into three others, viz.: (1) Can Congress derive this power from the fact that the transportation is interstate? (2) Can Congress derive this power from the fact that the transportation is done by a common carrier *whose rates must be reasonable* to all? (3) Can Congress derive this power from the fact that the transportation is done by a common carrier *who cannot unjustly discriminate?*

(1) *Can Congress derive this power from the fact that the transportation is interstate?*

This question is not affected by the fact that the transportation service is performed by a railroad company or other common carrier. The possible effects of that fact will be discussed under the second and third questions. In the Minnesota cases this Court decided that the services of a railroad carrier were its property, just as the services of a private individual are his property. The only differences between the common carrier's property rights in its services and the private individual's rights in his services are, first, that the common carrier must sell to all who wish to buy at a reasonable price, and second, that the carrier must not unjustly discriminate in its prices between purchasers. The power in question is, as we have shown, the power to prohibit transportation between the States, or what is the same thing the power to prohibit such transportation except on such conditions as Congress may see fit to impose. This power, if it exist simply by virtue of the fact that the transportation is interstate, must apply as well to such transportation when done by private individuals for themselves or by carriers not common carriers, as to such transportation done by railroad carriers. The

transportation is itself interstate commerce. Moreover, the power, if it exist, must extend to prohibit, at the will of Congress, all commerce between the States, to prohibit the sale of commodities as well as their transportation, to prohibit the transmission of telegraphic messages as well as the carriage of goods—in short, to prohibit intercourse of almost every conceivable kind. Again, there is no provision of the Constitution requiring uniformity as among the several States in the exercise of this power. Congress may, therefore, cut off one State, and prohibit all commerce between her and the other States.

These considerations prove, as we think, that the power of Congress to regulate commerce is not the power to destroy commerce. If not, then Congress cannot, simply by virtue of its power to regulate commerce, forbid a private individual to engage in interstate transportation, that is, to sell his transportation services. If Congress cannot forbid a private individual to sell his services at all, it cannot forbid his selling them at their market value, for such a prohibition would deprive him of his property. If Congress cannot forbid a private individual to sell his services at their market value, it cannot forbid a common carrier to sell its services at their market value, unless the fact of its being a common carrier gives Congress the power. There are only two characteristics that distinguish common carriers from private individuals or carriers. This power of Congress, if it exist, must, therefore, be derived from one or the other of those distinguishing characteristics.

(2.) *Can Congress derive this power from the fact that the transportation is done by a common carrier, whose rates must be reasonable to all?*

The common carrier is a common carrier not by virtue of Congressional legislation, but by the general State law. It is to the latter law that we must look for a definition of the characteristics which make a "common carrier." It is in the common law that we find the obligation

of the common carrier to carry at reasonable rates, and it is to that law we must look to ascertain the meaning of the expression "reasonable rates." Does that expression mean rates made upon some theoretical method of so-called "equality"? or does it mean rates that correspond reasonably to the market value of the service?

We have already pointed out that the term "reasonable" is one of those indefinite terms found in our common law, which refer for their meaning to that innate reason and sense of justice which are supposed to be attributes of the human mind. We have pointed out that the term is incapable of exact definition apart from the facts of the particular case. We meet now the question by what general considerations is a judge to be guided in seeking to ascertain whether the prices fixed by a carrier for its services are "reasonable."

Clearly, if it be possible to show that the rates in question have appealed to the minds of a great number of men as "reasonable," that they have acquiesced in them and acted upon them, such evidence is the best of which the matter is capable. In the face of such evidence, all *a priori* theories, even of the judge's own mind, must yield to the consensus of the minds of other men. Now, the evidence we can offer in support of the reasonableness of rates made on the basis of the value of service sold, is the consensus of the whole commercial world, including as well the purchasers as the sellers of railroad transportation. Not only have those engaged in commercial pursuits acquiesced in the making of rates on that basis, and made their investments accordingly, but the Courts and the Bar also have likewise acquiesced; and now, after more than a half century of practice based upon that method of fixing rates, the method itself has become one of the laws of commerce in this country beyond the control of the carriers or the purchasers of transportation. Therefore, we say, this law of commerce has become a part of the definition of the term

"reasonable rates." There is no longer room for theories of "exact equality" so called, because the basing of rates on the value of service sold, necessarily makes inequalities, if "equality" be determined by the "amount and quality of service."

There is no authority, so far as we can ascertain, for the supposition that such theoretical "equality" was ever recognized by the common law as an element in determining the reasonableness of a rate.

On the contrary we find the highest authority that the value of the service is the true test of reasonableness.

In the case of Canada Southern Rwy. Company vs. The International Bridge Co., (1883) L. R. 8 App. Cas. 723, one of the questions involved was the reasonableness of the rates charged by the Bridge Company. The Lord Chancellor, (Earl of Selborne,) delivering the judgment of the Privy Council, said (731:) "That being so, the question of reasonableness only remains. Their Lordships have been struck with one thing, and that is that the two arguments which have been used, the one that the whole tariff is laid down by the 2d section of the Amending Act, and the other that the actual tariff is unreasonable, are not very easy to reconcile with each other; because it is clear that if the words "for each other passenger the sum of 25 cents," did apply to railway passengers, it would authorize taking a sum exceeding very much what is taken under the actual tariff, which is only 10 cents.

The truth is, that the whole argument which has been urged as to the test of reasonableness is one which it would be excesively difficult to apply to the ordinary traffic, otherwise than by railway, under the Amending Act, where all the fixed charges may be taken, and manifestly without the slightest reference whatsoever to the amount of dividend which might be obtained by the shareholders in a company. If there had been an express regulation of the railway traffic fixing maximum tolls to be taken, ejusdem

generis with that which we find as to the other traffic, it would, ex necessitate, have excluded this whole argument as to the principle on which the reasonableness of charges of this kind ought to be determined.

It certainly appears to their lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. That is the only thing he is concerned with. They do not say that the case may not be imagined of the results to a company being so enormously disproportionate to the money laid out upon the undertaking as to make that of itself possibly some evidence that the charge is unreasonable, with reference to the person against whom it is charged. But that is merely imaginary. Here we have got a perfectly reasonable scale of charges in everything which is to be regarded as material to the person against whom the charge is made. One of their Lordships asked counsel at the bar to point out which of these charges were unreasonable. It was not found possible to do so. In point of fact, every one of them seems to be, when examined with reference to the service rendered and the benefit to the person receiving that service, perfectly unexceptionable, according to any standard of reasonableness which can be suggested. That being so, it seems to their Lordships that it would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and, after manipulating the accounts in their own way, to ask a Court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, and who may possible, as in the case alluded to by the

learned Judge in the Court below, the case of the Tay Bridge, have the whole thing swept away in a moment, are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the bridge company gets a dividend which is alleged to amount, at the utmost, to 15 per cent. Their Lordships can hardly characterize that argument as anything less that preposterous."

The question under discussion then, resolves itself into the question, Can Congress fix a theoretical measure of reasonableness at variance with the meaning of the word "reasonable" as defined by the common law? That Congress cannot do so, follows necessarily from the proposition that the obligation and the right of the carrier to charge reasonable rates are derived from the common law. This will be made clearer by an illustration. The State's governmental power to fix a maximum of rates to be charged by a common carrier on transportation within the limits of one State, is derived from the common law obligation of the carrier to charge reasonable rates. So we admit for the purposes of the present case, that Congress has the governmental power to fix a maximum of rates to be charged by a common carrier on interstate transportation, a power derived likewise from the same common law obligation of the carrier. But this Court has decided in the Minnesota cases, that the State cannot by virtue of its governmental power. prescribe as a reasonable rate, a rate that is wholly unremunerative to the carrier, and that the State cannot do so, because the reasonableness required by the common law is what the judiciary, interpreting the common law, shall find to be reasonable. Therefore, the State's power through its Legislature, to regulate the reasonableness of rates, is confined by the limits of the carrier's common law obligation from which the power is derived. Since the power of Congress over the common carrier is derived from the same common law obligation, it must be subject to the same restrictions.

(3.) *Can Congress derive this power to impose the Commission's theoretical rule of "equality" from the fact that the transportation is done by a common carrier who cannot* UNJUSTLY *discriminate?*

Under the head of "Analysis of the Act," we have already discussed the meaning and effect of the word "unjust" in the statement of the common law duty of the carrier. The argument just made to show that Congress cannot out of its own head enact a meaning for the word "reasonable," will apply equally to prove that Congress cannot similarly enact a meaning for the word "unjust."

But that we find so much confusion of thought in the writings of theorists on the subject, we should have supposed unquestionable the statement, that a power derived from a common law obligation must be measured by the extent of the obligation at common law.

The foregoing argument to show that Congress has not the power, (and, therefore, could not have intended,) to enact the theoretical rule of rates which the Commission seek to apply in the present case, applies equally to prove that Congress can enact no other theoretical rule of rates. The words "just" and "reasonable" have acquired meanings which define the obligations of the carrier so far as the method of making rates is concerned.

The meanings of those words may and will grow with the growth of commerce, but neither Congress nor any other governmental power controlled by the Constitution of the United States, can arbitrarily enact new meanings therefor, and so change the carrier's obligations.

This Court has decided that the right to receive reasonable compensation for services rendered is a property right, protected by the Constitution as well for the carrier as for the individual; that what is reasonable compensation is for the judiciary, interpreting the common law, to decide.

The common law has been interpreted by the judiciary and by the common usage so far as to determine that the rates produced by fixing rates on the basis of value, are reasonable.

Therefore, no government under the Constitution can require the carrier to adopt a basis of rates that results in making rates different from those fixed on the basis of value, for such a requirement necessarily deprives the carrier of his property right to receive reasonable compensation.

Appellant's Points.

It remains only to notice briefly the points made in the brief for the appellant.

"Constitutional Questions."

After stating correctly (pages 17 and 18) the constitutional point raised by us, the brief (pages 19 to 42, and pages 50–55) proceeds to establish propositions wholly irrelevant to the issue. The argument under the heading "Alleged invasion of private property rights," (pages 42 to 50,) assumes that the property right asserted by us, is the right to fix rates by virtue of some provision in the defendant's charter Acts, amounting to a contract. Inasmuch as the right asserted by us is neither greater nor less than that maintained by the railroad companies in the Minnesota Cases, whose charters, as there decided, contained no contract as to rates, it follows that the argument (pages 42 to 50) is wholly irrelevant.

"The Main Issue."

The argument under the sub-heading "Parol evidence, its office and what it shows," (pages 55 to 66,) is answered by the quotations made from the testimony under the head, "Analysis of the Act" herein.

Under sub-head, "Burden of proof," (pages 66 to 68,) the argument assumes that the finding of the Commission that the reduced rate given the party of ten is an unjust discrimination, is a finding of fact, whereas the finding itself purports to be based on the meaning of the Act and not on any characteristics of the rates compared, except their inequality. The argument itself is a fine example of the *petitio principii.*

Under the heading, "Inequality of charge unlawful even though not excessive," the argument is based on what we have called the "Taxation and Cost Theory," the theory which asserts that any discrimination is unlawful, whether hurtful to any one or not.

The argument under the next sub-head (pages 74 to 77), to show that the P. C. & St. L. R. R. Co. is a rival, injured by the making of the party rate, simply misses the whole point. The question is whether a discrimination between the single passenger and the member of the party is unjust? The law is that no discrimination is unjust unless it harm the person who pays the higher rate. Whether a rival carrier likes the method of making the rates or not, or chooses to adopt the same method, is a question that has no bearing whatever on the legality of the discrimination.

Under the heading "Sections 1 and 2 create distinct obligations," (pages 77 and 78,) the argument recurs to the Commissions "Equality" theory, and then under the head, "Some of the Cases," (pages 78 to 98) proceeds to cite decisions which hold the rule against *unjust* discriminations. The very existence of the open and universal practice of carriers in making the reduced rates proved in this case, side by side with these decisions, itself shows that the doctrine of the decisions is not identical with the "equality" theory of the Commission, which holds that all discriminations are unlawful whether unjust or not.

The same remark applies to the decisions cited under subsequent heads of the brief. Under the head "Does this statute merely re-enact the common law?" beginning

at page 110, the argument implies that the Court below did not adopt the view that the common law or the general state law requires that common carriers should not make unjust discriminations, but that the Court below adopted the view of the Massachusetts, South Carolina and Florida decisions that the duty of a carrier consists only in making reasonable rates without regard to impartiality between customers. That this implication finds no justification in the opinions of the Judges below, is evident on the face of the opinions. It is true the Judges below did not adopt the view that the common law requires equal rates without regard to the question whether the inequality is harmful. There is no such rule to be found in the decisions of courts interpreting the common law. The statements quoted in the appellant's brief in which the word "equal," or the word "equality" is used in describing the carrier's common law duty, are statements quoted from decisions rendered in cases where, under the facts, inequality would constitute unjust discrimination.

The attempt to base an argument on the provisions of chapter 90 of the English Act of 1845 requires no other answer than to state that that section is totally unlike section 2 of the Act to regulate commerce; and even section 90 of the Act of 1845 has not been construed by the English courts to prevent the making of what we term in this country, commutation rates for passenger traffic.

In "Railway Accounts and Finance," by J. Alfred Fisher, (published by Bemrose & Sons, London, 1891,) pages 5 to 8, will be found full descriptions of the following tickets issued by the English railroads:

1. Passenger Tickets; 2. Ordinary Tickets; 3. Blank Card Tickets; 4. Periodical or Season Tickets; 5. Tourist Tickets; 6. Tourists' Extension of Time Tickets; 7. Members of Family Tickets; 8. Excursion Tickets; 9. Market and Fishing Tickets; 10. Pleasure Parties' Tickets; 11. Officers', Soldiers', &c. Tickets; 12. Coupon Orders.

There is no section like section 22 in the English Acts; the common law and section 2 of the Railway and Canal Traffic Act of 1854, and even section 90 of the Act of 1845, control the business; and yet the English companies conduct their passenger business just as the Baltimore and Ohio Railroad Company claims the right to conduct its business.

We submit that the decree below should be affirmed.

JOHN K. COWEN,

HUGH L. BOND, JR.,

Counsel for Appellee.

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 889.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLEE.

APPEALED FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SOME SUGGESTIONS IN REPLY TO BRIEF OF APPELLEE

BY

SHELLABARGER & WILSON, *For Appellant.*

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The argument of the appellee in substance is:

That inasmuch as the general law of some of the States has always required that railway rates be reasonable, and that all patrons of carriers be served impartially, and inasmuch as it has been the constant practice of railroad com-

panies to sell mileage, excursion, commutation, and "party rate" tickets at reduced prices, and inasmuch as no reported case is produced where this practice has been held to be illegal, therefore reduced rates in such cases must be reasonable and cannot be considered unjustly discriminative.

The argument, in other words, is that the long continuance of this practice in jurisdictions where the common law in force forbids unjust discrimination between customers of railroads shows that the practice does not constitute an unjust discrimination.

In answer to this it may be observed that the mere fact that the practice has not been judicially decided to constitute an unjust discrimination at common law in such jurisdictions is by no means conclusive that it would not be so decided should the question be presented for adjudication; for it is to be remembered that if there is no adjudicated case condemning the practice, neither is there any sustaining it. But the argument overlooks the statutory definition of "unjust discrimination" contained in section 2 of the "Act to regulate commerce." The common law in those States where impartiality between customers is required of carriers lays down a general principle forbidding unjust discrimination, but does not undertake to say what particular acts or conduct shall constitute the offense.

The statute goes further and stamps as unjust discrimination a certain act or course of conduct which is plainly specified therein. The act or conduct on the part of the carrier which is declared by section 2 to be "unjust discrimination" is charging one person more or less than another for "*a like and contemporaneous service*" in transportation "*under substantially similar circumstances and conditions.*"

But, says counsel for appellee, the substantial similarity of circumstances and conditions refers not only to the particular service rendered by the carrier, but to the situation of the person or persons to whom it is rendered; and the circumstances and conditions of any one of a party of ten persons offering themselves for transportation at one time between the same points, it is said, are substantially dissimilar to those of a single individual offering himself for transportation at the same time between the same points. The dissimilarity, it is said, consists in the difference between the amount of transportation purchased by the party of ten and by the single individual respectively. In other words, it is the difference between selling by wholesale and selling by retail. But, as between one party of individuals and another party of individuals, both offering themselves for transportation between the same places and at the same time, where shall the line be drawn determining that the members of one party shall be charged less than the members of the other party? And who is to determine this question? The practice, arbitrarily adopted by the carrier, is to give the reduced party rate to ten and to refuse it to nine. But why? Is there any substantial dissimilarity between the circumstances and conditions of a member of a party of ten seeking transportation and a member of a party of nine seeking transportation between the same points at the same time? And if the carrier may arbitrarily draw the line, may it not draw it between one and two or between 99 and 100 as well as between nine and ten?

But, it is further suggested by the appellant's counsel, and they fortify their position by quotations from leading writers on philosophy, that harm to some assignable person

is an essential element in the definition and idea of injustice. It is admitted, in the language approvingly quoted from John Stuart Mill, that "Injustice may also be done by treating a person better than others; but the wrong in this case is to his competitors, who are also assignable persons."

This admission illustrates and vindicates the rule which the Commission is accustomed to apply (and which, by the way, is wholly misconstrued on page 38 of appellee's brief)—that is, that "rates must be relatively reasonable." In other words, to determine the reasonableness of a rate or charge for transportation, its effect upon third persons, as well as upon the immediate parties to it, must frequently be considered. Traffic charges which unjustly discriminate between customers of a carrier are unreasonable.

But it is further asserted in appellee's brief that no harm is done to any one else by granting the lower rate to parties of ten. This is a somewhat gratuitous assertion and hardly tallies with common experience or common sense. (See further appellants' opening brief, pp. 71 to 77.) Is it to be presumed that no one is harmed by their giving a lower rate to a party of ten than to a party of nine or any less number, and that therefore the carrier may lawfully do this? If so, why not also permit the carrier to give a lower rate to one single individual than to another, unless it be affirmatively shown against the carrier that the latter is harmed by its doing so? It will hardly be contended, however, that the law allows the carrier this liberty. It must surely be presumed that harm is done to one passenger if another is charged a less sum for the same service. To prove direct and specific injury or harm to the person charged the larger amount it would generally be necessary

to show that he was a competitor in business with the one charged the smaller amount. If one man purchases a ticket from New York to Washington, in order to argue a case in court, and another at the same time purchases a ticket between the same places, over the same road, by the same train, in the same car, going to perform a surgical operation, it cannot be said that any direct injury or harm would be done to the one by charging him fifteen dollars for the ticket while the other is charged but ten dollars. Yet that it would be held an illegal discrimination will not be denied.

If, however, a railroad company from Atlanta to New York sells to one merchant going on to buy goods a ticket for $50 while it charges another merchant going on at the same time and for the same purpose only $25 for the same service, the direct and specific harm done to the former is plainly apparent. So in respect to "party rates," if a theatrical party of ten get a rate of two cents a mile from New York to Cincinnati and a party of nine young men on a pleasure trip are charged the regular rate of three cents per mile for the same service, it is impossible to show that any direct and specific harm is done to the latter; but if a musical company of ten members and another musical company of nine members, both of New York, are competitors for employment at some entertainment in Cincinnati, it is evident that charging each of the ten two cents a mile for transportation while charging each of the nine three cents a mile for the same service results in direct harm to the latter. But the application of the general principle cannot depend on the question of direct and specific harm shown to be done to any particularly designated person.

The principle is analogous to that which forbids transactions between individuals under certain circumstances. For instance, contracts or transactions of a guardian or other fiduciary or trustee, in respect of the trust property, are often held to be voidable at the instance of the *cestui que trust*., entirely regardless of whether in the particular case any wrong has been done to the latter in the transaction.

The ground of avoidance is the generally dangerous character of such transactions and the wrong—often very difficult of detection—which might be perpetrated by means of them. So of the power of carriers to make party rates, the danger that it may be injuriously exercised has induced Congress to forbid it altogether.

These considerations alone would appear sufficient to show that the party rate to ten, as a minimum, comes within the definition of unjust discrimination as laid down in section 2. Similar considerations tend, though perhaps not so conclusively, to show that mileage, excursion, and commutation tickets are embraced within the same definition.

This conclusion as to the last-mentioned class of tickets is not so clear as it is in respect to party-rate tickets, because any single individual may avail of the mileage, excursion, and commutation tickets, whereas not less than ten together can avail of the party-rate tickets. In the first case no discrimination is made between single individuals or between parties composed of different numbers of individuals offering themselves for transportation. Mileage, excursion, or commutation tickets are sold at the same price *per capita* to a party of nine persons who apply to purchase them as they are sold to a party of ten who apply to purchase them. In the case of the party-rate ticket, on the other hand, an arbi-

trary discrimination is made between one of a party of nine or less and one of a party of ten or more, so that, though mileage, excursion, and commutation tickets are probably included in the definition of unjust discrimination given in section 2, yet the considerations just advanced in respect to the character of those tickets induced Congress to permit their use, as it did, by the provisions of the twenty-second section of the act.

Now, in respect to the distinction between commutation and party-rate tickets, while the testimony tends to show that tickets have sometimes been issued, available for a certain amount of travel, either to a single individual or to several, it clearly appears and the appellee's answer admits that the party-rate ticket is and was at the time the law was passed well understood among railway men as an entirely different thing, answering an entirely different purpose, from the commutation ticket.

It may be true that both these classes of tickets are issued by the carriers on the same business principle, namely, to stimulate travel and make up by numbers for the reduction per trip or *per capita*.

But the function and the incidental discriminative effect of the "party-rate" ticket is very different from that of the commutation ticket.

The quotation from appellee's answer, on pages 11 and 12 of its brief, clearly shows the recognized distinction existing when the law was passed between party rate, mileage, excursion and commutation tickets and the respective functions of each.

So that when it is found that Congress expressly permits the use of mileage, excursion, and commutation tickets,

omitting all mention of "*party-rate*" tickets, the plain implication is that the use of the latter is prohibited.

This implication, drawn from the language of the twenty-second section and based on the principle of "*expressio unius, exclusio alterius*," when coupled with the definition and prohibition of unjust discrimination contained in the second section, should place beyond controversy the correctness of the Interstate Commerce Commission's ruling on this question.

This case does not involve the mere abstract question of the reasonableness of a charge for transportation as between the immediate parties to the transaction. It involves the right of other persons to receive the same service for the same price under similar circumstances. The case cited in appellee's brief, of Canada Southern Railway Company *vs.* The International Bridge Co. (L. R., 8 App. Cas., 723), has, therefore, no application here. That case involved merely the reasonableness of the rate of toll charged by the bridge company to the railroad company. The question of discrimination was not involved at all. The court seems to have held that the service was worth to the railroad company the price charged for it by the bridge company, and that the fact that the bridge company realized large profits from the service at prevailing prices did not prove the prices to be unreasonable. Whether or not this doctrine is sound need not be discussed in this connection, for it manifestly does not affect the case at bar.

Hozier's case (1 Railway and Canal Traffic Companies, p. 27), referred to in appellee's brief, arose under the English act of 1854, forbidding a railroad company in general terms to give any person "any undue or unreasonable preference

or advantage," or to subject any person to any "undue or unreasonable prejudice or disadvantage." That act did not undertake to define "undue preference or advantage," "prejudice or disadvantage," and therefore differed essentially from the second section of the "act to regulate commerce," where the "unjust discrimination" forbidden is also specifically defined. It is to be noted in this connection that the third section of the American act contains the prohibitions of undue preference and undue prejudice which are found in the English act of 1854, under which the Hozier case was decided. The second section, containing much more specific language than the third, must have been intended to have a further operation and effect than the third, else it would never have been inserted, and the rights of parties would have been left to be determined by the general expressions of section 3. Had the second section been omitted from "the act to regulate commerce," the Hozier case might with more propriety have been cited in this case; but in the face of that section it possesses no value as an authority. Even in that case it was distinctly asserted by both the judges delivering opinions that had any prejudice or disadvantage resulting to the complainant from the higher rate charged him been shown, the decision would have been otherwise. It thus appears that the English courts have held that the burden of proving an actual prejudice or disadvantage under the act of 1854 is on the complainant, and this is the extent of Hozier's case.

But the "act to regulate commerce" has distinctly and in terms prohibited discrimination of a certain kind—that is, charging one person more or less than another for the same service under similar circumstances—and that it was

not intended to confine the prohibition to cases where actual damage might be shown, appears from the provision of the last clause of section 13, that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

As has been shown above, the practice of granting party rates to ten while refusing them to any less number must frequently result in direct damage to parties who are charged the higher rate. The practice in its general results was, in the opinion of Congress, a pernicious one, and was, therefore, prhibited *in toto*. The question of direct damage resulting from the practice will not be considered as affecting the general question of its lawfulness.

This conclusion is not based on any abstract theory of equality of rates, but upon the principle that where any custom or practice is in its general results unjust or injurious it may be forbidden by legislation, although in some particular cases the injustice or injury may not be directly apparent.

The fact that legislation of this sort may injuriously affect the revenues of a railway company by terminating a course of business which has proved remunerative cannot affect the validity of the legislation. As said by this Court in the case of *Barton* vs. *Barbour*, 104 U. S., p. 135, "a railroad is authorized more for the public good to be subserved than for private gain. As a highway for public transportation, it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy; but the public retains rights of vast consequence in the road and its appendages, with which

neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto."

So when Congress prohibits a certain kind of discrimination on the part of a railroad company as being, in its opinion, injurious to the public welfare, such legislation cannot be successfully assailed on the ground that it reduces the revenues of the carrier. The right of the public to be treated without unjust discrimination is paramount in the eyes of the law and the Constitution, to the carrier's right to make money. So that while the right to receive reasonable compensation for services rendered may be a property right protected by the Constitution as well for the carrier as for the individual, this cannot include the right to discriminate unjustly between customers because the carrier gets a larger revenue by so doing.

Even at common law and in the absence of any statute the carriers will not be allowed to pursue a practice repugnant to a general public policy, even though it be shown that they do so in good faith for the purpose of increasing their revenues and without intending to show favors or to impose disadvantages on any one. This is well illustrated by the case of *Hays* vs. *Railroad Company*, cited in appellee's brief, where it was held that "a discrimination in favor of parties furnishing the largest quantity of freight and solely on that ground is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen and a wrong to the disfavored party for which the courts are competent to give redress."

The appellee's suggestion that the construction given by the Commission to the second section of the act deprives the carrier of its right to receive reasonable compensation for its services is thus shown to be without foundation.

SAM'L SHELLABARGER and
J. M. WILSON,
For Appellant.

Since the preparation of this brief several opinions have been pronounced by the Supreme Court of the United States, which strongly support the views herein presented.

In the case of Trinity Church *vs.* United States, (decided Feby. 29, 1892,) the Court admits the "great force to this reasoning," viz., that specific exceptions imply a legislative intention to include everything not excepted.

True, in that case the Court, from consideration of the title of the act to prohibit the importation of foreign laborers; from consideration of the circumstances leading to its enactment; from consideration of the reports of committees of both houses of Congress recommending the measure; and from considerations of the repugnancy of the construction contended for by the Government, to the Christian principles of the American people, decided that ministers of the Gospel, though included by the general expressions of the act, were not within the legislative intent.

But the preceding pages have shown, it is believed, how the prohibition of party-rate tickets *was* within the intention of Congress, when it defined and forbade "unjust discrimination,"—this conclusion being fortified by the exclusion of other kinds of tickets.

A further reason for supposing that the intention of Congress was to exclude from special privileges in transportation, all classes not expressly excepted from the provisions of the act, is furnished by the introduction at every session, of measures designed to enlarge the exceptions and extend them to other classes.

A still further reason why special privileges in transportation will not readily be presumed to belong to any special class of persons, is suggested by the opinion in the Trinity Church case.

One of the grounds of decision in that case was, that a construction of an act resulting in the exclusion of a minister of the Gospel from our shores, would be repugnant to the Christian instincts of the American people. Christianity, it was justly said, is an organic principle of American constitutions and laws.

No less fundamental a principle of our institutions is that of the equal rights of individuals. The allowance of special privileges in transportation to any man, or set of men, or number of men, except in cases expressly defined, is repugnant to the American instinct of justice. That instinct asserts the right of every person to use the agencies which the carrier provides on equal terms with all his fellows, and finds an invasion of that right in every unauthorized deviation from charges commonly imposed. It offends our conception of equality to permit two men, or ten men, by combining together to get cheaper public service than either could obtain alone. The average judgment, perceiving in this law the expression of a wise and just principle, will be intolerant of any exception to its enforcement not specifically contained in its provisions, and disapprove any impairment of this individual right by inference or construction.

It would seem that where Congress in the exercise of its power to regulate commerce has prohibited certain acts and contracts on the part of carriers, "with the courts the question is only one of power."

Now, as to the legislative power to interfere with railway traffic charges, there certainly can be no more extreme exercise thereof than the fixing of maximum rates by law.

In the case of Railroad Company *vs.* Wellman, also just

decided, the power of the legislature to fix rates below those fixed by the carriers is distinctly affirmed. This, too, in a case where it is shown that existing revenues were inadequate to pay dividends on the stock *bona fide* and actually paid in, and expended on the property of the company. The argument of the court was that even should the reduction of rates on certain business operate to reduce earnings, yet *non constat* that revenues might not be maintained from other sources.

Now, even should the prohibition to sell party-rate tickets reduce the revenues of the carrier *non constat* that they may not be maintained from other sources. The fact that the question of *discrimination* is involved in the use of the party-rate ticket, while it was not involved in the Wellman case, adds greatly to the force of the argument in favor of the power of Congress.

In the case of United States *vs.* Ballin Joseph & Co., also just decided, the Court construed the constitutional power of each house of Congress to "*determine the rules* of its proceedings." To "determine a rule" is to "regulate;" hence, the power given each house to determine its rules of proceeding is analogous to the power of Congress derived from the same source "to regulate commerce." Speaking of the rules of the house the Court says: "Neither do the advantages or disadvantrges, the wisdom or folly of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution and powers of each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of pro-

ceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just."

Are not these remarks equally applicable to the power of Congress to "regulate commerce"? And if so must not the decision be necessarily against the appellee?

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 889.

THE INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.
APPELLEE.

Supplemental Brief for the Baltimore and Ohio Railroad Company, Appellee.

JOHN K. COWEN,
HUGH L. BOND, JR.
Counsel for Appellee.

THE INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY. Appellee.

IN THE

Supreme Court

OF THE

UNITED STATES.

No. 889.

SUPPLEMENTAL BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellee.

Statement.

The constitutional argument in the brief already filed for the appellee, is based upon the proposition that Congress has not the power to define arbitrarily the meaning of the word "reasonable," or of the words, "unjust discrimination," but that as those words are used to define the rights of a common carrier they are protected by the Constitution from change by the Legislature. As putting that proposition beyond question, we cited the case of Chicago, &c., Railway Co. vs. Minnesota, 134 U. S. 418, 455–6–8.

Since that brief was filed, this Court has announced its opinion, in the case of Budd vs. State of New York. This last opinion contains some dicta in which the case in 134 U. S. is distinguished from the case decided, in terms which may be construed as a recession by this Court from

the principle announced in 134 U. S. It becomes necessary, therefore, that we enter more fully into the discussion of the proposition on which our constitutional point rests.

ARGUMENT.

In the case of Munn vs. Illinois, 94 U. S. 113, this Court laid down three propositions: (1.) That the State had a legislative control over certain public employments. (2.) That the elevating of grain, conducted by Munn, was a public employment subject to such legislative control. (3.) That the legislature's power of control was unlimited, and as against it the person engaged in a public employment was not protected by the property provision of the Constitution, but that the legislature had absolute power to say what benefit he should derive from the lands and buildings used by him in the public employment, and even to say that he should derive no benefit from the use of those lands and buildings.

The facts of the Munn case did not raise the question of the limits of the legislative power to regulate a public business; but nevertheless, the opinion of Chief Justice Waite states the power as without limit:

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

"As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially.

But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the Courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures, the people must resort to the polls, not to the Courts."

The argument we have quoted may be summed up in the statement, that the person engaged in a public employment is not deprived of his property, because he has

no *property*, within the meaning of that word as used in the Constitution.

When the Chief Justice speaks of "property in which the public has an interest," he is using the word "property" in a new meaning other than that which it bears in the Constitution. The Constitution says that a State shall deprive no one of his property. This Court holds that the State may deprive Mr. Munn of his elevator. Therefore, Mr. Munn's elevator can not be property.

We reach the same conclusion if we follow the argument of Mr. Justice Bradley in his dissenting opinion in the Minnesota cases, where he speaks of the Act of the Legislature as the "due process of law" required by the Constitution. This argument begs the whole question. The Act of the Legislature is merely the expression of its will. Land and structures, the beneficial use of which may be taken from the holder and bestowed on the public at the will of the Legislature, cannot properly be called the "*property*" of the holder, within the meaning of the Constitution.

In the case of Stone against the Farmers Loan and Trust Company, 116 U. S. 307, this Court, in an opinion delivered by Chief Justice Waite himself, solemnly abandoned so much of the decisions in Munn vs. Illinois as held that the State's power of legislative control was without limit. The passage in which this Court distinctly changed its ground is found on page 331, as follows: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need

not now say, because no tariff has yet been fixed by the Commission, and the statute of Mississippi expressly provides 'that in all trials of cases brought for a violation of any tariff of charges, as fixed by the Commission, it may be shown in defence that such tariff so fixed is unjust.'"

If this means anything it means that the interest of the railroad company or elevator company in the lands, buildings and other objects used by it in its public employment is property within the meaning of the Constitution; that the word "property" in the Constitution applies to the interest of one engaged in a public employment in the land, buildings and other objects used by him in the employment.

The case of Dow vs. Beidelman, 125 U. S. 680–9, quotes with apparent approval the language from 116 U. S. 133, that we have quoted above.

In Georgia Banking Co vs. Smith, 128 U. S. 179, the statement is again approved: "It has been adjudged by this Court in numerous instances that the Legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, *subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation.*"

The statement we have quoted from Stone vs. Trust Co., was again quoted and affirmed in Chicago &c. R. R. Co. vs. Minnesota, 134 U. S. 418, 455–6.

What is the effect of this radical change of principle? What propositions necessarily follow from the principle that the lands and buildings of Munn are his property within the meaning of the Constitution?

(1.) It is no longer true that "for protection against abuses by Legislatures" Munn "must resort to the polls,

not to the Courts." He may now resort to the Court and there obtain the protection which the Constitution affords him against the Legislature itself.

(2.) It is no longer true of him, that he has "no vested interest in any rule of the common law." All the rules of the common law which go to define his rights of property are by the provisions of the Constitution placed beyond the power of the Legislature to change.

The effect of embodying the provision of Magna Charta in the State constitutions, and the Fourteenth and Fifteenth Amendments of the Federal Constitution, was to create a vested right in all the rules of the common law, whether rules of conduct or otherwise, which go to make up the definition of "property," of "liberty," of "due process of law," of the "law of the land."

In Pumpelly vs. The Green Bay Co., 13 Wall., 166, 177, Mr. Justice Miller, delivering the opinion of the Court, said: "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators *as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them*, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because in the narrowest sense of that word it is not taken for the public use."

It is precisely as though each principle of the common law which goes to define "*property*" had been written at length in the Constitution. To ascertain the definition of "property," that is, to ascertain what rights are included

under that word, we must look to the principles of the common law, just as this Court in Murray's Lessee et al. vs. Hoboken Land and Improvement Co., 18 How. 272, looked to the principles of the common law to ascertain the definition of "due process of law." Hence so soon as this Court decided that the interest of Mr. Munn in his elevator was property, although used in a public employment, at that moment this Court vested in Mr. Munn as property rights protected by the Constitution all the principles of the common law which define what the possessor may do with property used in a public employment.

Now, one of the principles, and the most important principle of the common law, which this Court has laid down as applicable to property used in a public employment, is the principle that each member of the public shall have the right to use the property for a reasonable charge.

In the Munn case this Court decided that the public might use this property without paying any charge, if the Legislature should so direct, but the Munn decision has been overruled so far as that proposition goes. With the overruling of that proposition, and the holding that Mr. Munn's elevator is property, there goes too the theory that Munn has a right to a reasonable charge, but that the Legislature may arbitrarily say what is reasonable. This is only stating in another form the proposition that Munn has a right only to such charge as the Legislature may authorize, which proposition we have shown to be equivalent to saying that Munn's interest in his elevator is not property.

It seems to us that the confusion on this subject has arisen largely from the nature of the word "reasonable" as a term of definition. As that term enters into the common law description of property used in a public employment, it is certainly beyond the power of the Legislature to change the meaning of the word; the word

must have its common law meaning, otherwise the Constitution is of no avail to protect such property against the Legislature. But at common law the word "reasonable" has no specific meaning apart from the facts of the particular case. A reasonable charge cannot be expressed in dollars and cents, unless the circumstances are given.

Hence great latitude is given the State's power of legislative control in fixing maximum rates, not by way of defining the word "reasonable" so that it may lose its common law meaning, but by way of application to the particular case. It may well be, however, that such legislative act may go so far as to prescribe a schedule of charges which are not reasonable within the common law meaning of that word. This Court had already indicated in its decisions prior to the Minnesota cases, that a maximum charge which left no profit whatever to the carrier for the use of his property, could not constitutionally be prescribed "reasonable." In the Minnesota cases, this Court decided that the specific charges prescribed by the railroad commission, were not within the common law meaning of the word "reasonable." If the carrier's right to charge a reasonable rate at all is protected by the Constitution, then the ultimate decision as to what is reasonable must rest with the judiciary interpreting the common law meaning of the word "reasonable."

The decision in the Minnesota cases followed inevitably from the abandonment in the Railroad Commission cases of the third proposition in the Munn case. If we turn to the common law to ascertain what definition it gives of the rights of one whose property is used in a public employment, we find that those rights are limited and defined by the principle that such an one can make only a reasonable charge for the use of his property. The term "reasonable," therefore, is an essential element in a definition of such property, and as such an element, the Constitution puts it beyond the power of the Legislature to change its

meaning. The reasonable charge which the owner of property in public employment is entitled to receive, is the reasonable charge of the common law as interpreted by the Court, and not the reasonable charge that may be arbitrarily fixed by a State Legislature or by Congress.

Surely there can be no distinction between the case where the State seeks by direct enactment to impose a charge that is not reasonable, and the case where the State seeks to do the same thing, through the agency of a commission; the power which the State is exercising is the same in each case. The constitutional restriction must apply to that power, whether exercised directly or through the agency of a commission. If the constitutional restriction applies in each case, then the power of this Court to enforce the constitutional restriction must be the same in each case.

The reference in this opinion in Budd vs. New York, to the case of Spenser vs. Merchant, 125 U. S. 345, 356, implies a supposed analogy between the Legislative power to control public employments and the taxing power. The suggestion seems to be that this power, like the taxing power, is not limited by the 14th amendment when exercised by the Legislature directly; that the requirement of due process attached only when the Legislature sees fit to delegate to semi-judicial bodies the assessment, or apportionment of the tax in the case of the taxing power, or the making of the schedule of rates in the case of the other power. That the supposed analogy is misleading, follows, in the first place, from the fact that the taxing power is a power in the State, unlimited by the Federal Constitution, while this Court expressly decided in Stone vs. Trust Company, and the other cases we have cited, that this power to regulate public employments was limited by the Constitution. Moreover, the supposed analogy does not furnish any ground to distinguish Budd vs. New York, from the Minnesota cases.

This Court decided in the Minnesota cases, not that the board, or special tribunal established by the Legisla-

ture to regulate the charges of railroad companies, must proceed in the manner prescribed by the principles in the common law, in regard to quasi-judicial bodies, viz., after a notice to those interested and an opportunity to be heard, but this Court decided in that case, that the question of reasonableness was one to be decided by the regular judiciary, constituting the judicial department of the State government. In regard to the taxing power, the requirements of due process and equal protection do not limit the extent of the power. They simply go so far as to require something like judicial fairness, in the assessment of property, or the apportionment of a tax by boards of assessors, or other bodies upon whom the Legislature has devolved that power. In regard to the power to control public employments, the constitutional requirements of due process and equal protection limit the extent of the power itself, and do not merely regulate the mode of exercising it.

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